(27)

No. 05-254
Vide 04-10649, 05-204, 05-276, 05-298, 05-439, 05-460

Title: Travis County, Texas, et al., Appellants
v.
Rick Perry, Governor of Texas, et al.

Docketed: August 26, 2005
Lower Ct: United States District Court for the Eastern District of Texas
Case Nos.: (2:03-CV-354)
Decision Date: June 9, 2005
Questions Presented

| ~~Date~~ | ~~~~~~~Proceedings and Orders~~~~~~~

	VIDED. (Distributed)
Jan 10 2006	Brief amici curiae of Samuel Issacharoff, Burt Neuborne, and Richard H. Pildes filed. VIDED. (Distributed)
Jan 10 2006	Joint appendix filed. (Joint appendix in two volumes) VIDED. (Distributed)
Jan 10 2006	Brief amicus curiae of NAACP Legal Defense and Educational Fund, Inc. filed. VIDED. (Distributed)
Jan 17 2006	Motion for divided argument filed by appellants in Nos. 05-254, 05-276, and 05-439. VIDED. (Distributed)
Jan 17 2006	Motion for divided argument filed by appellants No. 05-204. VIDED. (Distributed)
Jan 20 2006	Application (05A663) to file respondents brief on the merits in excess of page limits, submitted to Justice Scalia.
Jan 23 2006	Supplemental letter of applicant received.
Jan 23 2006	Motion for divided argument filed by petitioners GRANTED. The time is to be divided as follows: 40 minutes for appellants in No. 05-276 and 20 minutes for appellants in No. 05-439.
Jan 23 2006	Motion for divided argument filed by appellants in No. 05-254 DENIED.
Jan 24 2006	Application (05A663) to file a consolidated appellees brief in excess of page limits granted by Justice Kennedy. The brief may not exceed 125 pages.
Jan 31 2006	Brief amici curiae of Ron Wilson filed. VIDED. (Distributed)
Feb 1 2006	Brief of appellees Tina Benkiser and John DeNoyelles filed. VIDED. (Distributed)
Feb 1 2006	Brief of appellees Rick Perry, Governor of Texas, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Glenn Richardson, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of American Legislative Exchange Council and Free Enterprise Coalition filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Alan Heslop, et al. filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Republican National Committee filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Robert C. Jubelirer filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Utah, Nevada, and Ohio filed. VIDED. (Distributed)
Feb 1 2006	Brief amici curiae of Edward Blum and Roger Clegg filed. VIDED. (Distributed)
Feb 7 2006	Reply of appellee Frenchie Henderson in support of appellants filed. (Distributed)
Feb 7 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Feb 17 2006	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 22 2006	Motion DISTRIBUTED for Conference of March 17, 2006.
Feb 22 2006	Reply of appellants Travis County, Texas, et al., Appellants filed. (Distributed)
Mar 1 2006	Argued. For appellants in No. 05-276: Paul M. Smith, Washington, D.C. For appellants in No. 05-439: Nina Perales, San Antonio, Tex. For appellees: R. Ted Cruz, Solicitor General, Austin, Tex.; and Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

No. [illegible] 2005

In The

Supreme Court of the United States

TRAVIS COUNTY, TEXAS, GUSTAVO LUIS "GUS" GARCIA, and CITY OF AUSTIN, TEXAS,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Does the Texas legislature's 2003 replacement of a legally valid congressional districting plan with a statewide plan, enacted for "the single-minded purpose" of gaining partisan advantage, satisfy the stringent constitutional rule of equipopulous districts by relying on the 2000 decennial census and the fiction of inter-censal population accuracy?

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors below:

Travis County, Texas; City of Austin, Texas; Gustavo Luis "Gus" Garcia; Eddie Jackson; Barbara Marshall; Gertrude "Traci" Fisher; Hargie Faye Jacob-Savoy; Ealy Boyd; J. B. Mayfield; Roy Stanley; Phyllis Cottle; Molly Woods; Brian Manley; Tommy Adkisson; Samuel T. Biscoe; David James Butts; Ronald Knowlton Davis; Dorothy Dean; Wilhelmina R. Delco; Samuel Garcia; Lester Gibson; Eunice June Mitchell Givens; Margaret J. Gomez; Mack Ray Hernandez; Art Murillo; Richard Raymond; Ernesto Silva; Louis Simms; Clint Smith; Connie Sonnen; Alfred Thomas Stanley; Maria Lucina Ramirez Torres; Elisa Vasquez; Fernando Villareal; Willia Wooten; Ana Yañez-Correa; Mike Zuniga, Jr.; Frenchie Henderson; American GI Forum of Texas; Simon Balderas; Gilberto Torres; Eli Romero; League of United Latin American Voters District 7; League of United Latin American Voters; Webb County; Cameron County; Juanita Valdez-Cox; Leo Montalvo; William R. Leo; Coalition of Black Democrats; Texas NAACP; Lester Bellow; Homer Guillory; John Bland; Rev. Willie Davis; and Congressmembers Sheila Jackson Lee, Eddie Bernice Johnson, Chris Bell, Gene Green, and Nicholas Lampson

Defendants below:

State of Texas; Rick Perry, Governor of Texas; Geoffrey S. Connor, Secretary of State of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Charles Soechting, Chair of the Texas Democratic Party; Tina Benkiser, Chair of the Texas Republican Party

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JURISDICTIONAL STATEMENT

Travis County, Gus Garcia, and the City of Austin (collectively, "Travis County appellants") urge the Court to take jurisdiction over this appeal and reverse the judgment below.

OPINIONS BELOW

The district court's unreported opinion, on remand from this Court, is reprinted as Appendix A at App. 1a-58a. The district court's pre-remand opinion is reported at 298 F.Supp.2d 451 (E.D. Tex. Jan. 6, 2004) and reprinted as Appendix B at App. 59a-214a.

JURISDICTION

Acting under 28 U.S.C. § 2284, the three-judge district court issued its opinion and judgment on remand on June 9, 2005, adhering to its earlier judgment and denying the injunction requested by the plaintiffs and plaintiff-intervenors. App. 42a, 230a. Travis County and the City of Austin filed their notice of appeal on June 25, 2005. App. 231a. Gus Garcia filed his notice of appeal on July 5, 2005. App. 233a-235a. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article I, section 2, clause 1, of the Constitution of the United States provides in relevant part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .

Article I, section 2, clause 3, of the Constitution of the United States provides in relevant part:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . .

Section 2 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

STATEMENT OF THE CASE

This appeal is from the district court decision on remand upholding the validity of the 2003 statewide Texas congressional redistricting plan – designated Plan 1374C – enacted in the third special session of the 78th Texas Legislature. 2003 Texas House Bill 3, 78th Leg., 3d C.S. (Oct. 12, 2003). The court's initial decision on the various challenges to the 2003 Plan inexplicably ignored the one

person, one vote issue urged by the Travis County appellants and other voters.[1] This Court, however, vacated the initial judgment and remanded the case for consideration in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *Travis County v. Perry*, 125 S.Ct. 352 (2004).

The district court did address the issue extensively on remand, dividing over it by a 2-1 vote. Two members of the court declined to adopt the argument. App. 33a-42a. The other member of the district court found the argument valid, concluding that the 2003 redistricting plan violates the one person, one vote requirement. App. 47a-56a.[2]

Redistricting in 2001

Federal reapportionment of congressional seats following the official 2000 census gave Texas two additional seats, bringing its total to thirty-two. *Perry v. Del*

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[1] Travis County and Austin raised the one person, one vote issue from the inception of the case. App. 5a, 33a-34a, 47a; *see* Joint Final Pretrial Order ¶ D.10(a). Gus Garcia, a citizen and registered voter residing in Austin in Travis County, as well as other voters spread across the state, also joined in the challenge. *Id.*, ¶ D.1(h) (adopting ¶ D.10(a)); Stip. E.23.

[2] This judge, however, specially concurred instead of dissenting because he concluded that the scope of this Court's remand did not extend to the impact of the post-*Vieth* summary affirmance in the one person, one vote case of *Cox v. Larios*, 124 S.Ct. 2806 (2004), and, hence, did not extend to the one person, one vote issue. App. 58a. The district court majority was uncertain whether the equal population issue was within the remand's scope. App. 41a-42a. Regardless of whether the remand for consideration of *Vieth*'s impact also embraced the impact of *Cox v. Larios*, the one person, one vote issue is properly before *this* Court. It has been an issue from the case's beginning, and the Travis County appellants' initial appeal, from the first district court decision in this matter, raised the equal population issue. In fact, it is the *only* issue raised by these appellants.

Rio, 66 S.W.3d 239, 244, 254 (Tex. 2001). By early spring of 2001, the state had sufficient block-level census data to redistrict Texas' then-malapportioned districts. *Del Rio*, 66 S.W.3d at 244, 254; Joint Pretrial Order Stip. E.82; App. 3a.

The Texas legislature, however, was unable to pass the necessary new congressional plan by the end of its regular session in late May of 2001. *Del Rio*, 66 S.W.3d at 246. The Governor ended any possibility of legislative action before the 2002 congressional elections on July 3, 2001, when he formally announced his decision not to call a special session on congressional redistricting. *Del Rio*, 66 S.W.3d at 243 & n.7.

Following state court proceedings that ended without a congressional plan, a three-judge federal court for the Eastern District of Texas, in *Balderas v. Texas*, stepped forward to perform the redistricting task to, among other things, "bring the district map into line with the equal population rule[.]" App. 83a. The *Balderas* decision and accompanying congressional map, designated Plan 1151C, issued in late 2001, and the plan was used for the 2002 congressional election cycle. Joint Final Pretrial Order Stips. E.2, E.70.[3] The state did not appeal but others did, and this Court summarily affirmed the decision and Plan 1151C's validity. *Balderas v. Texas*, 536 U.S. 919 (2002).

[3] The 2001 *Balderas* decision is Appendix C to this jurisdictional statement. App. 215a-229a. The district court consolidated the cases involved in the instant appeal with the *Balderas* cases.

Redistricting in 2003

The 2002 elections changed partisan control of the Texas legislature, but not the partisan balance of the Texas congressional delegation, where ticket-splitters maintained Democratic members in a tenuous majority. App. 89a. Early in the 2003 regular session, in response to a legislative request, the Texas Attorney General formally determined that state law did not mandate any legislative action on congressional redistricting and that the *Balderas* plan would remain effective for the remainder of the decade in the absence of state legislative action. Tex. Att'y. Gen. Op. GA-0063 (April 23, 2003).

The legislature moved forward with the task anyway. After failing to enact a new congressional redistricting plan in the regular session and two special sessions of the legislature, the new majority prevailed in a third called session.[4] Two years and seven months, and one full round of elections, after receiving census numbers sufficient for redistricting, the Texas legislature enacted Plan 1374C. As the district court determined in its initial decision, the "single-minded purpose" behind Plan 1374C was "to gain partisan advantage." App. 89a.

State's use of 2000 census despite evidence of significant change over three years

By its own admission, the state "did not make any effort to determine the current populations of the congressional

[4] The out-of-state flight of Democratic legislators in the Texas House and Senate to deprive the legislature of the quorum necessary to enact the congressional redistricting legislation was widely chronicled. *See* App. 62a-63a (summarizing efforts).

districts" as of the date of enactment of the 2003 Plan. Joint Final Pretrial Order Stip. E.85. Instead, it relied exclusively on the uncorrected census numbers from before the 2002 elections. *Id.*[5]

Undisputed trial evidence, though, from Austin's official demographer shows huge changes in the size and dispersion of Texas population between the March, 2001, release of the official census data for redistricting and Plan 1374C's enactment. *See* Travis County/City Exh. 1.[6] "[R]apid and spatially uneven population surges and declines" made the 2000 block-level population data from the census "old and specious" both statewide and in local communities. *Id.* More than a million persons had been added to the Texas population in the interim. *Id.* And the rapidly rising Hispanic share of the population meant that Plan 1374C districts were drawn that "do not fully reflect the current size and spatial scope of the state's largest and most rapidly expanding minority community[.]" *Id.* The result of all this growth and its uneven spread was that, in actuality, Plan 1374C's use of 2000 census block data left the "resultant districts . . . not balanced with each other in terms of population." *Id.*[7]

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[5] Before enactment of Plan 1374C, the Census Bureau issued corrected (not updated) official census numbers for Texas, adding thirty people to the state's total population count. *See* Travis County/City of Austin Exh. 2.

[6] Declaration of Ryan Robinson: Post-Census 2000 Demographic Change in Texas. The state offered no contrary evidence at either the initial trial or on remand.

[7] One of the few exhibits admitted on remand – LULAC Exh. 2 – highlights the dramatic intra-state population shifts and growth between the 2000 census and 2003. Drawn from the estimates of the Texas State Demographer, *see* http://www.txsdc.tamu.edu/tpepp/txpo

(Continued on following page)

Contrast between contemporary political considerations and complacent acceptance of stale census numbers

Plan 1374C may have ignored these population changes in its one person, one vote calculus, but those charged with redrawing the lines assuredly did not in their political calculus. Representative King sponsored the redistricting bill in the House and led the House's map-drawing effort. App. 93a, 171a. He testified at trial, for example, about his concerns during the mapping effort about whether new Congressional District 4 (running along the Red River) would fall into the Republican column in the upcoming election and explained that he designed it so that the population growth he saw there would let it "grow into" a Republican district during the decade. Trial Tr., 12/18/03[8] He identified new Congressional District 12 as a district drawn to take advantage of quite recent trends in population shifts in Wise County not far from Fort Worth. Trial Tr., 12/18/03. The Senate's own chief staff map-drawer, Bob Davis, testified that he thought it "silly" to use 2000 census numbers to draw

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pest.php (website of Texas State Data Center and Office of the State Demographer), the exhibit has a congressional district-by-congressional district comparison of population under the 2000 census with the state demographer's 2003 estimates. As a whole, the state's population had grown an estimated 1,266,689 between the 2000 census and 2003, a 6% increase overall. The district estimated to be the most populous by 2003 (CD 3) had 84,081 more people in it than the district estimated to be the least populous by that point (CD 19). District 23 had grown by an estimated 32,253 people in the ensuing three years. The district court split, 2-1, in its initial decision over whether Plan 1374C's CD 23 violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. *Compare* App. 126a-160a (majority) *with* App. 187a-209a (dissent).

[8] "Grayson and Collin counties are fast-growing Republican areas."

congressional maps in 2003 to meet the one person, one vote standard. Trial Tr., 12/18/03.[9]

The much-contested District 23 provides further evidence of the fundamental inconsistency, blessed by the district court majority, between the legislature's use of stale demographic data for meeting its constitutional obligation of equipopulous districts and its use of contemporary understandings of demographic and political data for achieving its political objectives. District 23, stretching along the Texas-Mexico border for hundreds of miles between Laredo in the east and El Paso to the west, but also reaching into the San Antonio suburbs further north, had been a Republican district since at least 1992 when its current incumbent, Congressman Bonilla, had first been elected. App. 126a. Under the 2001 *Balderas* plan, District 23 had not performed consistently as a Hispanic opportunity district despite having a bare majority of Hispanic citizen voting age population. App. 126a. Yet, by 2003, due to Hispanic population growth, the district, as drawn in the *Balderas* plan, "was moving in th[e] direction" of becoming an effective Hispanic opportunity district. App. 128a. Recognizing what population growth was doing to the partisan make-up of the district drawn by the court, and in order to protect Congressman Bonilla, the Texas legislature in its 2003 Plan split off several hundred thousand Hispanic voters from the 2001 version of the district and "prevented it from continuing to move toward becoming an effective opportunity district." App. 142a, 166a. In other words, using 2002 election data and contemporary understandings of population trends – but

[9] "I thought it was silly to make that assumption in a state as big as Texas."

using 2000 population numbers to satisfy constitutional demands – the legislature in 2003 terminated District 23 as what the district court termed an "evolving Hispanic influence district." App. 167a n.201.

The legislative approach in 2003, therefore, was to use contemporary political and demographic understandings for purposes of meeting the overarching political objectives of the redistricting but not to bother with determining and using contemporary demographic realities for purposes of meeting the fundamental constitutional requirements for such actions. Elections in 2002 determined where lines would be drawn, as did post-2000 population trends; yet, the three-year old census reports were used to determine how many people would be inside the lines in response to the equal population rule.

The legislators, politicians, and their map-drawing staff all had an eagle-eye on post-census population developments and carefully crafted Plan 1374C to use them to further their partisan objective. The district court blessed this use of post-census population shifts and even used later elections, in 2002, to condone the lines drawn as a consequence. The district court majority's conclusion, implicit though it may have been, was that, while politics may take the reality of population shifts into account to ensure a shift of power between political parties, the Constitution may not demand that the same realities be taken into account to ensure a shift of power for the people who are to be represented.

THE QUESTION IS SUBSTANTIAL

In its first post-*Vieth* redistricting case, the Court summarily affirmed a district court decision striking down a legislative redistricting plan for violating the one person, one vote rule. *Cox v. Larios*, 124 S.Ct. 2806 (2004). Two concurring Justices explained that, after the splintered decision in *Vieth*, the equal population rule is the "only clear limitation" remaining for improper redistricting practices and cautioned that "we must be careful not to dilute its strength." 124 S.Ct. at 2808 (Justices Stevens and Breyer, concurring).

The district court's decision dilutes the strength of the one person, one vote rule for congressional districts – where the rule is supposed to be most restrictive, *see Karcher v. Daggett*, 462 U.S. 725 (1983) – in a way that opens the door wide for repeated mid-decade redistrictings to ensconce and enhance the congressional position of the party holding the reins of state power. This incentive to escalate partisan redistricting was a prime concern of the panel member who discerned a one person, one vote violation. App. 48a. He cited Justice Bryer's *Vieth* dissent: "By redrawing districts every 2 years, rather than every 10 years, a party might preserve its political advantages notwithstanding population shifts in the State." 541 U.S. at 267 (J. Bryer, dissenting).

In the post-*Vieth* world, it is critically important to the democratic functioning of the House of Representatives that one of the few constitutional restraints on unbridled partisanship in the formation of the House's membership be infused with sufficient strength to at least give pause to those who would undertake what all members of the Court

seemed to recognize in *Vieth* are troubling modern methods for reconfiguring the polity.

As part of its one person, one vote jurisprudence, the Court has long countenanced a legal fiction that populations do not shift among districts between decennial censuses. Despite its real-world understanding that "[d]istrict populations are constantly changing, often at different rates in either direction, up or down," *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Court has concluded that, once a state's post-census redistricting is accomplished to account for population shifts and changes, the state may "operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

The reason for the fiction is plain: to avoid the necessity of constant redistricting to satisfy the equal population rule. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 583 (1964) (Court's equal population rule not meant to require "daily, monthly, annual or biennial" redistricting). The district court's acceptance of the fiction in the circumstance of the Texas redistricting, though, turns the rationale upside down. Instead of using the fiction of inter-censal population stasis to avoid never-ending redistricting, the district court used it to countenance repeated mid-decade redistricting, as frequently as partisan pressures propel it.

The Travis County appellants are not asking that the fiction be abandoned. They are urging, instead, that it not be recognized in the novel circumstances of this case. When a state has a legally valid plan in place, after the decennial census numbers are published and before the first election following their publication, it should not be permitted to rely solely on the inter-censal population

stasis fiction to meet the equal population rule if it voluntarily undertakes to redraw its congressional lines after the first post-census round of elections. Not indulging the fiction in such a circumstance would put a constitutional brake on, but not necessarily halt, voluntary, partisan-driven redistricting in mid-decade.

The district court was plainly troubled by the vexing new political development presented by the Texas redistricting. It acknowledged that the "most compelling arguments" against mid-decade redistricting arise from the "impropriety . . . of frequent redistricting." App. 84a. It even mused about the desirability of judicial limitations that focus on the "time and circumstance of partisan linedrawing" as opposed to *Vieth*-type inquiries. App. 98a. Yet, in the end, two of its three members yielded to the state's request that the fiction be indulged.

Jettisoning the fiction of inter-censal accuracy would serve to revive the one person, one vote rule as a meaningful check on partisan excesses, while not rigidifying the system with broad structural prohibitions.[10] Removing the fiction as a safe harbor for the Texas Legislature's baldly partisan effort would reinforce Justice O'Connor's observation that "the one person, one vote principle safeguards the individual's right to vote, not the interests of political parties." *Davis v. Bandemer*, 478 U.S. 109, 149 (J. O'Connor, concurring).

[10] The district court asserted that "broad-spectrum responses have no place here." App. 33a. The legal principle urged by the Travis County appellants is consistent with the assertion.

THE EQUAL POPULATION RULE FOR CONGRESSIONAL DISTRICTS PERMITS ONLY UNAVOIDABLE VARIANCES FROM ABSOLUTE QUALITY, AND PLAN 1374C'S VARIANCES WERE ENTIRELY AVOIDABLE.

A. The equal population rule for congressional districts permits only "unavoidable" variances from a "good faith," absolute equality requirement.

The issue presented rises directly from the Court's one person, one vote jurisprudence in the congressional context. *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that Article I, section 2, of the Constitution sets a constitutional standard of equal population among the districts. In *Karcher v. Daggett*, 462 U.S. 725, the Court held that this standard permits only limited, "*unavoidable*" variances from a good-faith, absolute equality requirement. 462 U.S. at 730 (emphasis added).

In actual fact, Plan 1374C will never have satisfied *Karcher*'s good faith, absolute equality requirement, neither at its inception and nor at any other point over the four election cycles it is designed to span. The Texas population had shifted from the census-painted picture in dramatic ways by the Fall of 2003. And, when the legislature enacted Plan 1374C, it insisted on using the increasingly stale census population data in a way that was entirely avoidable. In short, the indisputable fact of its gross departure from actually meeting one person, one vote standards directly contradicts *Karcher*'s insistence that only "unavoidable" departures are permitted.

The desire to right perceived partisan wrongs of the past that are said to have driven Plan 1374C's passage[11] cannot justify these avoidable departures. The Court has explained that "[p]roblems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster." *Kirkpatrick v. Preisler*, 394 U.S. 526, 533 (1966). Furthermore, the one person, one vote command is to achieve population equalization, not the equalization of political power. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 703 (1989). The state cannot justify dispensing with the equal population rule by claiming that its legislature was only trying to right perceived past wrongs when the chance first arose.

B. The state failed to proffer any reason, other than the legal fiction of inter-censal population stasis, for its 2003 departure from population equality among its congressional districts.

The state failed to carry its burden of demonstrating that Plan 1374C satisfies the one person, one vote standard.[12] The *Karcher* rule permits only limited departures from absolute equality among congressional districts. Such departures are permitted only if they are "unavoidable"

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[11] App. 21a-24a; 26a-27a (accepting state's argument that the 2003 Republican gerrymander was to replace the lingering effects of a 1991 Democratic gerrymander). The 1991 congressional redistricting plan was expressly held not to be a partisan gerrymander under the then-reigning *Davis v. Bandemer* rubric. *See Terrazas v. Slagle*, 821 F.Supp. 1162, 1172-1175 (W.D. Tex. 1993) (3-judge court).

[12] Travis County and Austin had introduced unrebutted evidence, in the form of the Robinson declaration, that actual population equality was not present in the Plan 1374C districts.

after a good faith effort to achieve absolute equality. 462 U.S. at 730. As already explained, the state made no effort whatever to achieve absolute equality, and its 2003 redistricting was entirely avoidable, since, as even the Texas Attorney General opined in response to legislative inquiry, the *Balderas* plan was legally valid for the rest of the decade.

In this circumstance, then, the burden shifted to the state to show that it had a basis for satisfying the strict one person, one vote rule. *Karcher*, 462 U.S. at 731. The state then had two choices. First, it could show that it updated the census numbers with substantial technical rigor. *Kirkpatrick v. Preisler*, 394 U.S. 526, 535 (1969).[13] Or, it could demonstrate that the deviations from strict equality were to achieve some otherwise legitimate goal. *Karcher*, 462 U.S. at 731. This construct explains when the state cannot use outdated numbers without bothering to explain or justify, not whether the state must use updated numbers.

In the face of these constitutional imperatives, the state retreated to the only redoubt it could find – the legal fiction of inter-censal population accuracy. The 2000 census is not a constitutional defense to the one person, one vote challenge, and applying the inter-censal fiction in these circumstances would be a perversion of the rationale for its existence.

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[13] The state, for example, could contract with the Secretary of Commerce for an official, mid-decade, special census of the state. *See* 13 U.S.C. § 196.

C. There is no constitutional link between official decennial population data and the one person, one vote rule.

The Court has indicated that the link between decennial census data and redistricting is *not* a constitutionally mandated one.[14] It has observed the important consequences of census data, "*not* delineated in the Constitution" for drawing intrastate political districts. *Wisconsin v. City of New York*, 517 U.S. 1, 5-6 (1996). In *Kirkpatrick v. Preisler*, the Court acknowledged that, if established with a high degree of accuracy, intra-census population shifts may be taken into account in applying the equal population rule in congressional redistricting. 394 U.S. at 535; *see also White v. Weiser*, 412 U.S. 783, 792 n.12 (1973) (same).

Similarly, in rejecting a structural constitutional argument against mid-decade redistricting, the district court here rejected the proposition that there is a constitutional link between the Census Clause and the one person, one vote rule: "[T]he Census Clause does not mention the states or their power to redistrict[.]" App. 70a-71a.[15]

The absence of a constitutionally-mandated link between the official census numbers and the equal population

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[14] If, on the contrary, there is a constitutional link, then the structural constitutional arguments against mid-decade redistricting made by some of the plaintiffs in the district court rise as a valid constitutional challenge to the Texas congressional redistricting in 2003.

[15] Consistent with this de-linkage approach, an early Texas case on redistricting after *Baker v.* Carr, 369 U.S. 186 (1962), approved the concept of the state looking beyond the increasingly stale 1960 census population numbers in drawing its congressional districts. *See Bush v. Martin*, 251 F.Supp. 484, 517 n.107 (S.D. Tex. 1966) (three-judge court).

rule, combined with the undisputed fact that the actual population numbers for Plan 1374C's districts were not equal among the districts when the plan was enacted, leaves the state only one defense: the inter-censal accuracy fiction.

The Texas experience in 2003, though, proves the wisdom of Justice Frankfurter's observation for the Court that "especially in the disposition of constitutional issues are legal fictions hazardous[.]" *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948). It is one thing to indulge a legal fiction such as the one in question here when it is necessary to *force* legislative action, while still giving a solid reference point to meet the constitutional rule and minimize partisan manipulation. It is quite another thing to indulge the fiction to *permit* legislative action to meet the constitutional rule when the overweening aim of the action is partisan manipulation.

One of the leading scholars on legal fictions wrote that the "purpose of any fiction is to reconcile a specific legal result with some premise or postulate." L. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 513, 514 (1931). He further warned that fictions should be treated as "servants to be discharged as soon as they have fulfilled their functions." L. Fuller, *Legal Fictions*, 25 Ill. L. Rev. 877, 898 (1931); *cf. United States v. Markgraf*, 736 F.2d 1179, 1187 (7th Cir. 1984) (J. Posner dissenting from denial of rehearing en banc) ("proper office of legal fictions is to prevent, rather than to create, injustices"), *cert. dism'd*, 469 U.S. 1199 (1985).

The reason for the legal fiction of inter-censal population stasis cannot be squared with its use by the state in its defense of Plan 1374C. Permitting its use in this case to uphold a factually malapportioned plan would create, rather than prevent, a constitutional injustice.

D. The Court should deny Texas's partisan gerrymander the safe harbor of the legal fiction of population stability, just as its summary affirmance in *Cox v. Larios* resulted in denying Georgia's partisan gerrymander the safe harbor of the 10% variation rule for state legislative districts.

The district court justified its refusal to ignore the fiction in the circumstances of the 2003 Plan by positing that using the 2001 *Balderas* plan would not result in any greater actual population equality among the districts than would use of Plan 1374C. App. 39a-40a. The court surmised that the actual population shifts had undermined actual equality as much for one plan as the other. *Id.*

The court's point is not really a refutation of the argument that the fiction's rationale does not apply in this situation. Instead, it is more in the nature of an explanation that absolute equality will not result from jettisoning the fiction in the circumstances of this case. Ultimately, it is an argument against the fiction more than an argument against not allowing its perversion in this circumstance. The Court already is aware that population shifts happen immediately after the census enumeration and that demographic dynamics mean that absolute equality might be momentarily achievable though never absolutely measurable.

But, beyond the tautological nature of the district court's discussion on this point, there is a more practical matter ignored by the court. When new lines are drawn after the census but before the first election following it, all the many factors impinging on where lines should be drawn – equal population, avoiding racial gerrymanders,

Voting Rights Act requirements, and, above all, politics – must be considered at the same time. *See, e.g., Bush v. Vera*, 517 U.S. 952, 1013 (1996) (J. Stevens, dissenting) (discussing how all the various factors and considerations come into play to ensure that "all competing goals were *simultaneously* accomplished) (emphasis added). In this way, there is an interlocking web of checks on unbridled partisanship. Removing one of the most basic strands – the one person, one vote requirement – from the web and permitting the partisanship to express itself undeterred by a fundamental constitutional concern would be an unnecessary encouragement of the very thing the courts, including most importantly this one in *Vieth*, have been concerned about: untrammeled partisanship in redistricting with no constitutional check.

In *Cox v. Larios*, 124 S.Ct. 2806, the Court summarily affirmed a district court decision that had thrown out Georgia's redistricting of its state legislative seats. *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004). The Georgia legislature had sought to protect its partisan gerrymandering by staying in what it thought was the safe harbor of the 10% population variation rule for state legislative districts. 300 F.Supp.2d at 1325. The district court found that sheer partisanship is not a legitimate state policy and concluded that this Court had "never sanctioned partisan advantage as a legitimate justification for population deviations." 300 F.Supp.2d at 1338, 1351.

While fully aware that summary affirmances are not to be read too broadly, the Travis County appellants note the striking similarities between the plan invalidated in *Larios* and the plan under consideration here. Here, as in Georgia, the state redistricted for partisan gain. Here, as in Georgia, the state sought to protect the partisan gain by

seeking what it perceived to be a safe harbor on the equal population flank. The safe harbor in *Larios* was the 10% variation rule; the safe harbor here, the legal fiction of inter-censal population stasis.

The same principle that drove the district court to deny the safe harbor in *Larios* should be invoked by this Court to deny the safe harbor to Texas. Anything less would severely weaken one of the few remaining constitutional restraints on unbridled partisanship in redistricting.

CONCLUSION

The Court should note probable jurisdiction, reverse the decision of the district court, and enjoin any further use of Plan 1374C.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRENCHIE HENDERSON, ET AL.	§	CIVIL ACTION
	§	NO. 2:03-CV-354
v.	§	
	§	Consolidated
RICK PERRY, ET AL.	§	

(Filed Jun. 9, 2005)

Before HIGGINBOTHAM, Circuit Judge, and WARD and ROSENTHAL, District Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We are asked to examine again, in light of the Supreme Court's decision in *Vieth v. Jubelirer*,[1] the claims that the redistricting plan for the election of the thirty-two members of Congress from Texas, adopted by the Texas legislature in 2003, is unconstitutionally tainted by excessive partisan purpose. Ultimately, we will adhere to our earlier judgment that there is no basis for us to declare the plan invalid.

We conclude that claims of excessive partisanship before us suffer from a lack of any measure of substantive fairness. The claims accept that some partisan motivation is inevitably present in the political enterprise of redistricting, but urge that at some point it can become unconstitutional, presumably a denial of equal protection. No party before us states with clarity the precise constitutional

[1] 541 U.S. 267 (2004).

deficit. Although the lead plaintiffs invoke the structure of equal protection analysis, they identify no suspect criterion or impinged fundamental interest in insisting that if the state acts with the "sole" purpose of partisan advantage in drawing legislative districts, regardless of its effects, the state must offer a "compelling explanation" for its effort. The conduct that plaintiffs condemn is offered only in unstructured form; their condemnation of practices such as targeting incumbent members and ignoring "communities of interest" and other "traditional" principles of redistricting comes untethered to constitutional texts.

The most frequently invoked image of the evil resulting from excessive partisanship in drawing congressional districts is the non-competitive district, a product of a member choosing his constituents. We are asked to recognize this as anti-democratic and implored to find a means to curb it. The vision of the House of Representatives controlled by members who do not face serious opposition to reelection is urged as a stain upon its historical image as an institution embracing the teaching of Cincinnatus. The argument ignores a historical fact; the Texas delegation has enjoyed non-competitive districts for at least the past four and one-half decades, long before there were two political parties with any strength in the state. The emergence of Texas as a two-party state has not altered this reality, although it has given rise to forces that have caused the Texas delegation now to approximate the relative statewide voting strength of the two parties. As we will explain, there is little to suggest that taking up the tools plaintiffs offer in attacking the 2003 Texas plan will in fact remedy this awkward reality.

After addressing the claims of excessive partisanship, we will turn to a narrower and seemingly more plausible contention that does not attempt to measure how much partisanship in redistricting is constitutionally excessive, but instead uses the requirement of one-person, one-vote as a tool to limit how often redistricting can occur. This contention aims only at "voluntary" mid-decade redistricting that occurs when a legislature replaces a valid existing plan put into place after the last census; it does not attempt to set a standard for direct judicial supervision over partisan influence in redistricting, but instead proposes a rule that is intended to prevent the specific type of redistricting that occurred in Texas in 2003. The argument is that a legislature seeking to displace a valid extant plan may not rely on decennial census figures to meet the stringent demands of one-person, one-vote, but must instead prove that its proposed plan distributes population in an equipopulous manner by use of actual current figures. While its relative simplicity is seductive and avoids the need to measure how much partisanship is constitutionally excessive, we are not persuaded that it is appropriate for this court to endorse this application of the one-person, one-vote requirement as a means to the end of limiting political influences on redistricting.

I

The history of this case and of the efforts of the Texas legislature to draw lines for its thirty-two congressional districts is set out in our previous opinion, and we will not repeat it here.[2] While the appeal from our judgment

[2] *See Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004).

upholding the plan adopted by the Texas legislature was pending before it, the Supreme Court decided *Vieth v. Jubelirer*. In *Vieth*, the Court affirmed the decision of a three-judge court rejecting claims by three registered Democrats who vote in Pennsylvania that a redistricting plan for congressional districts adopted by the Pennsylvania legislature should be set aside because it constituted an impermissible political gerrymander, in violation of Article I and the Equal Protection clause of the Fourteenth Amendment. Their complaint, in addition to other claims, alleged that the districts were "meandering and irregular" and "ignored all traditional redistricting criteria . . . solely for the sake of partisan advantage."[3] The three-judge court granted defendants' Rule 12 motion to dismiss for failure to state a claim, and the Supreme Court affirmed.

Shortly thereafter, in *Cox v. Larios*,[4] the Court summarily affirmed the judgment of a three-judge court that had rejected a redistricting plan of the Georgia legislature as failing to conform to the principle of one-person, one-vote. The district court held that because the legislature sought to give advantage to certain regions of the state and to certain incumbents in an effort to help Democrats and hurt Republicans, Georgia was not entitled to the 10% deviation toleration normally permitted when a state is drawing lines for its legislature.[5]

Then, after the summer recess, the Court remanded the present case "for further consideration in light of

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[3] *Id.*, at 272-73 (internal quotation marks and brackets omitted).

[4] 124 S. Ct. 2806 (2004).

[5] *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge panel), *summarily aff'd*, 124 S. Ct. 2806 (2004).

Vieth,"[6] making no reference to its decision in *Larios*. Responsive to the remand order, we received briefs and heard oral argument from all parties and amici.

Although in our prior opinion we turned back many attacks upon the legislative plan for electing members of the Texas congressional delegation, we read the remand order to be a directive to reexamine only our rejection of the claim that the Texas plan is an illegal political gerrymander. This mandate does not include consideration of other attacks, with the possible exception of the claim that the Texas plan failed to abide the command of one-person, one-vote. Variations of this one-person, one-vote claim have been in the case from its inception, but came to the fore only in the arguments following the remand to this court. The Court made no mention of one-person, one-vote in its remand order, nor was it at issue in *Vieth*. However, this issue was present in the Court's examination of Georgia's plan in *Larios* in a way arguably related to the present case. Any examination of compliance with one-person, one-vote thus faces the threshold hurdle of whether the claim is within the mandate of the remand. We will treat this question in due course.

II

The light offered by *Vieth* is dim, and the search for a core holding is elusive. This observation is not a criticism, but a recognition that *Vieth* reflects the long and twisting historical narrative of political gerrymanders in the United States.

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[6] *Jackson v. Perry*, 125 S. Ct. 351 (mem.) (Oct. 18, 2004).

The most recent chapter in this history of partisan influence upon the drawing of legislative districts involves the federal judiciary's effort to play the role it claimed for itself in *Davis v. Bandemer*.[7] Judicial reluctance to surrender this role is understandable. The move to the one-person, one-vote principle in *Reynolds v. Sims*[8] both answered some of the critics of *Baker v. Carr*[9] and fulfilled the predictions of others who warned against entering the political thicket.[10] While hardly analogous to the quest for standards for reining in partisan gerrymanders, the relatively quick two-year process culminating in *Reynolds* encourages those reluctant to concede the futility of finding an effective standard for *Bandemer*. And as we will suggest, we have yet to calculate the full costs of achieving the clear and easily administered standard of *Reynolds*.

In addition, there is hesitation to concede that any solutions must come from legislatures and other political players whose critics say lack the ability to restrain themselves. This fear is fueled by the advent of computer-driven redistricting, which has taken this hoary practice to a new level.[11] There is wariness of lines that fall precisely

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[7] 478 U.S. 109 (1986) (finding political gerrymandering claims justiciable).

[8] 377 U.S. 533 (1964) (applying one-person, one-vote principle to malapportionment claims).

[9] 369 U.S. 186 (1962) (finding malapportionment claims justiciable).

[10] *See, e.g., Colegrove v. Green*, 328 U.S. 549, 556 (1946) (opinion of Frankfurter, J).

[11] *See Vieth*, 541 U.S. at 345-46 (Souter, J, dissenting), citing Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 624 (2002) ("[I]ncumbent entrenchment has gotten worse as the computer technology for more exquisite gerrymandering has improved and political parties have ever more brazenly pursued

(Continued on following page)

where the draftsmen intend – an absence of randomness or sufficient extraneous forces that the draftsmen must accept. At bottom it is a concern that the power to draw lines is inadequately checked, an implicit accusation that the political process is inadequate to the task. There is also the reality that many members of the House of Representatives enjoy a more secure tenure than members of the Senate for the simple reason that Senators run statewide, while their colleagues in the House may run in districts crafted to their advantage.[12] Answers to such questions do not come easily.

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incumbent protection"); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the* 2000 *Census*, 50 STAN. L. REV. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders."); Richard H. Pildes, *Principled Limitations on Racial and Partisan Restricting*, 106 YALE L.J. 2505, 2553-54 (1997) ("Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences.")

Even before the computer enhanced the ability to draw precise lines, the politicians were hardly without their own devices. At the same time, these perceived legislative line-drawing failures are distant from the state legislature's six-decade gridlock that the Court faced in *Baker v. Carr*. *See* 369 U.S. at 187-95 (Tennessee General Assembly had not been reapportioned since 1901, despite the Tennessee Constitution's decennial requirement); *see also Reynolds*, 377 U.S. at 583 (same, in Alabama).

[12] One commentator has noted:

> For the most part, redistricting appears to be done by barons dividing up fiefdoms, not by democratically accountable representatives. . . . The gerrymandered House contrasts with elections the same day for nongerrymandered Senate seats and governorships. About half of all gubernatorial and U.S. Senate elections were competitive in 2002, compared with fewer than 10% of House elections.

(Continued on following page)

The Founders were no strangers to the self-interest afflicting legislators charged with drawing the lines for their own seats. Nor were they blind to the need to locate the power to curb potential abuses, With Article I, Section 4, they gave to the legislatures of each state authority to prescribe the times, places and manner of holding elections for Senators and Representatives.[13] The Founders also insisted upon a superintending of the exercise of this power granted to the states. They gave that assignment to Congress by granting it the power to "make or alter" such regulations.[14] Congress has exercised this power from time to time, as Justice Scalia recounted in his opinion in *Vieth*.[15] While not directly speaking to the difficulties of gerrymandered state legislatures, this explicit placement in the Congress of the power to supervise the authority granted to states, coupled with the difficulty faced by judges of divining rules or standards adequate to distinguish a judicial decision resolving issues of partisanship in redistricting from a legislative act, has to date left the courts in the indefensible position of undertaking a task they cannot perform.

In upholding the Texas plan for congressional districts, we followed an unbroken line of cases declining to

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Richard H. Pildes, *The Supreme Court 2003 Term – Foreward: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 63-64 (2004) (footnotes omitted).

[13] U.S. CONST. art. I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

[14] *Id.*

[15] 541 U.S. at 275-77 (plurality opinion).

strike down a redistricting plan as an illegal partisan gerrymander.[16] We left any change in direction to the Supreme Court, making only brief observations about our own years of work in this case and in drafting plans with the feared computers.[17] We observed that the Court could make an honest case of *Bandemer* by either setting a standard or concluding that the issue was not justiciable. We expressed deep reservations over any approach that would dilute the critical Voting Rights Act by deploying it in name only or by borrowed concepts. We were and remain wary of employing metrics to determine how much is too much partisan motive or effect in redistricting, convinced that such an approach could not move the Court from its stasis under *Bandemer*. We need not further recount these observations.

In *Vieth*, the four Justices in the plurality voted to end the search for a workable standard, concluding that the legality of partisan gerrymanders is not justiciable and

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[16] *See, e.g., O'Lear v. Miller*, 222 F. Supp. 2d 850, 859 (E.D. Mich.) (three-judge panel), *summarily aff'd*, 537 U.S. 997 (2002); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1043 (D. Md. 1994) (three-judge panel); *Terrazas v. Slagle*, 821 F. Supp. 1162, 1172-75 (W.D. Tex. 1993) (three-judge panel); *Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C.) (three-judge panel), *summarily aff'd*, 506 U.S. 801 (1992); *Ill. Legislative Redistricting Comm'n v. La Paille*, 782 F. Supp. 1272, 1275-76 (N.D. Ill. 1992); *Badham v. March Fong Eu*, 694 F. Supp. 664, 671 (N.D. Cal. 1988) (three-judge panel), *summarily aff'd*, 488 U.S. 1024 (1989); *see also Vieth*, 541 U.S. at 280 n.6 (collecting cases); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 543 (2004) ("In the ensuing eighteen years [since *Bandemer*], not a single challenge to a congressional or state legislative reapportionment managed to satisfy this standard.").

[17] *Session*, 298 F. Supp. 2d at 457, 474-75.

should be left to the political arena.[18] Four dissenting Justices offered various possibilities for a standard that might serve a judicial role.[19] Justice Kennedy cast the pivotal fifth vote to affirm the dismissal of the partisan gerrymandering claim.[20] Although Justice Kennedy found each of the standards offered in the dissents deficient, he declined to abandon the search for a standard and, presumably, provided the fifth vote necessary to remand the present case.

Upon our reading of *Vieth*, then, our mandate requires us to look at this record again, with the message that the Court is unpersuaded by contentions that it can never properly locate a standard adequate to a judicial role in policing partisan gerrymanders, but that the standards the plurality rejected in *Vieth* were inadequate to that task. In their arguments on remand, the plaintiffs have offered various approaches for adjudicating claims of partisan gerrymandering. While the State's contention that most, if not all, of these arguments have been rejected by a majority of the Court is strong, we decline to stop there, given the unusual fracture of the Court in *Vieth*. We can only fairly read the remand to suggest that the Justice providing the fifth vote sees the possibility of a workable standard emerging from this case, the rejected allegations of the complaint in *Vieth* aside. We turn then to the various solutions offered on remand.

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[18] 541 U.S. at 305-06 (plurality opinion).

[19] *Id.* at 317-41 (Stevens, J., dissenting); *id.* at 343-55 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355-68 (Breyer, J., dissenting).

[20] *Id.* at 305-17 (Kennedy, J., concurring).

III

We first address the argument of the Jackson Plaintiffs[21] that the current redistricting map is unconstitutional because it was driven solely by a partisan agenda. Before reaching the merits of this claim, however, we find it illuminating briefly to recount some of the events leading up to the passage of the redistricting plan now under attack.

A

The history of electoral politics in Texas during the latter half of the twentieth century can be described as the story of the dominance, decline, and eventual eclipse of the Democratic Party as the state's majority party. From Reconstruction until approximately the beginning of the 1960's, the Democratic Party dominated the political landscape in Texas.[22] In 1961, John Tower became the first Republican Senator elected from Texas since 1875.[23]

Throughout the 1960's, and for much of the 1970's, Republican voting strength on a statewide basis hovered

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[21] Our reference to "Jackson Plaintiffs" includes the following: all plaintiffs included in the Amended Complaint filed on November 7, 2003, on behalf of the existing Jackson, Mayfield, and Manley plaintiffs; additional plaintiffs included there for the first time; and the Democratic Congressional Intervenors.

[22] *See* Mike Kingston, *John Tower: The GOP's Godfather*, *in* TEXAS ALMANAC 1992-1993 (1991), at 438 ("For most of the 20th century, Republicans were more a party of patronage than a legitimate political force in Texas. The action was within the ranks of [the] Democratic party where conservatives battled liberals, and the Democratic nomination was tantamount to election.").

[23] *Id.*

near 35%.[24] During this time, Republicans never held more than four congressional seats at one time.[25]

In 1978, William Clements, Jr., was elected Governor of Texas, becoming the first Republican to hold that office since 1874.[26] In the 1978 election, Democrats won twenty out of twenty-four congressional seats and captured 56% of the vote in statewide races, while Republicans' statewide strength stood at 43%.[27] Republican strength grew throughout the 1980's such that by 1990, the Republican Party had nearly achieved parity with the Democratic Party, garnering 47% of the statewide vote compared to the 51% for the Democrats.[28] Nonetheless, Democrats still held the lion's share of congressional seats, with nineteen compared to the Republican's eight.

No doubt aware of the growing strength of the Republican Party, the Texas legislature, controlled by Democrats, enacted a redistricting plan in 1991.[29] Under this plan, Democrats won twenty-one congressional seats in the 1992 election compared to nine won by the Republicans, even though the "tipping-point" had been reached with the Democratic and Republican parties capturing an equal share of the vote in statewide races.[30]

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[24] *See* Appendix.

[25] *See* Mike Kingston, *Republican Party in Texas*, *in* TEXAS ALMANAC 1982-1983 (1981), at 490.

[26] *See* Mike Kingston, *Politics and Elections*, *in* TEXAS ALMANAC 1982-1983 (1981), at 491.

[27] *See* Appendix.

[28] *Id.*

[29] *See infra* note 48.

[30] *See* Appendix.

Throughout the 1990's, Republican strength continued to grow, while the Texas congressional delegation remained firmly in the hands of Democrats. By the end of the decade, Republicans were consistently winning every statewide race on the ballot, including the offices of governor, lieutenant governor, attorney general, and seats on both the Supreme Court and Court of Criminal Appeals.[31] Yet with the 1991 Democratic Party gerrymander still in place, Democrats captured seventeen congressional seats to the Republicans' thirteen in the 2000 election, despite Republicans garnering 59% of the vote in statewide elections to the Democrats' 40%.[32]

Following the 2000 census, the Texas legislature was unable to pass new lines for the Texas congressional delegation, and the task eventually fell to this court.[33] For reasons that we will discuss, the plan produced by this court perpetuated much of the 1991 Democratic Party gerrymander. In the 2002 elections, the number of congressional seats held by Democrats remained unchanged, with Republicans gaining the two seats added by the census. In 2003, the Texas legislature, now controlled by Republicans, passed the redistricting plan that we upheld in *Session* and now review again in light of *Vieth*. Under this plan, Republicans captured twenty-one congressional seats in the 2004 election compared to eleven for the Democrats.[34] In this election, Republicans carried 58% of

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[31] *See* Office of the Secretary of State, 1992-2005 Election History, at http://elections.sos.state.tx.us/elchist.exe (last visited Apr. 1, 2005).

[32] *Id.*

[33] *See Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002).

[34] *See* Appendix.

the vote in statewide races compared to 41% for Democrats.[1] It is against this backdrop that we now consider the Jackson Plaintiffs' arguments on remand.

B

The Jackson Plaintiffs urge that we "distill from the *Vieth* opinions the principle that a decision to revise a districting map, along with particular features of the map, become unconstitutional when the evidence makes clear that the legislature was driven solely by a partisan agenda." Invoking equal protection analysis, the Jackson Plaintiffs contend that sorting voters for the sole purpose of gaining partisan advantage can serve no rational or legitimate purpose. This approach focuses on voluntary legislative redistricting – "voluntary" in the sense that it sets out to replace a valid extant plan. By definition, this approach would tolerate efforts to gain partisan advantage when the legislature is compelled to redistrict because the extant plan is invalid, such as when new decennial census figures require redistricting to comply with one-person, one-vote or to accommodate changes in the numbers of legislative members. This is so because efforts to gain partisan advantage in involuntary redistricting do not constitute the sole reason for the undertaking. Rather, the Jackson Plaintiffs' approach takes aim at mid-decade (or "mid-cycle") efforts to replace a valid extant plan, drawing on the observation in *Session* that structural or process-based constraints may have more purchase because they

[1] *Id.* By way of comparison, when the statewide voting strength was roughly reversed in 1982, Democrats took twenty-two congressional seats to the Republicans' five. *Id.*

avoid the difficulties attending efforts to gauge how much is too much partisan motive or gain.

In support of their argument, the Jackson Plaintiffs point to Justice Kennedy's opinion in *Vieth*, in which he observes that a "determination that a gerrymander violates the law rests on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."[36] Justice Kennedy, the argument continues, pointed to the Court's denial in *Baker v. Carr* that it needed to "enter upon policy determinations for which judicially manageable standards are lacking . . . if on the particular facts . . . a discrimination reflects *no* policy, but simply arbitrary and capricious action."[37] It is suggested that redistricting for purely partisan purposes is an example of such arbitrary and capricious action. It is further suggested that this "sole reason" approach by its own terms would not apply in *Vieth* because the Pennsylvania legislature had to redistrict for multiple reasons, including the legal requirement of redrawing the lines after the 2000 decennial census in ways that created equipopulous districts based on that census, as well as satisfying the Voting Rights Act and accounting for "traditional" districting criteria, such as incumbent protection and minimizing split precincts.

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[36] 541 U.S. at 307 (Kennedy, J., concurring).

[37] *Id.* at 310 (Kennedy, J., concurring) (quoting *Baker*, 369 U.S. at 226) (internal quotation marks omitted).

Finally, the Jackson Plaintiffs parse the opinions of the four dissenting Justices, noting that all sought to locate a principle that would identify plans lacking a rational basis. The Jackson Plaintiffs urge that condemning efforts undertaken solely to gain partisan advantage is such a principle. They add as a final implementing principle the proposition that when a legislature controlled by a single party replaces a legal redistricting plan in the middle of the decade, the effort should be presumptively unconstitutional. They conclude that this presumption could be overcome only by a "compelling explanation."[38]

In response, the State urges that *Vieth* "squarely rejected the notion that 'sole,' 'predominant,' or 'only' partisan intent suffices to state a claim." In *Vieth*, the Court found insufficient allegations that the Pennsylvania districts "ignore[ed] all traditional redistricting criteria, including the preservation of local government boundaries, solely for the sake of partisan advantage."[39] The Court noted that the plaintiffs had alleged that when the Pennsylvania legislature turned to redistricting after the 2000 census, "the Republican Party controlled a majority of both state Houses and held the Governor's office. Prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted

[38] This ignores, as it must, the reality that even with an overarching objective of feathering the party nest, the various cuts and turns of a redistricting plan with its reverberating impacts are infused with myriad mixtures of local politics and accommodation, inevitably producing lines drawn for a variety of reasons and objectives, often inconsistent with the overall objectives of partisan gains.

[39] 541 U.S. at 272-73 (plurality opinion).

pro-Democrat redistricting plans elsewhere."[40] The Court in *Vieth* had before it allegations that the Pennsylvania map was drawn "solely" and "exclusively" for political ends by a single-party-controlled legislature. These allegations were insufficient to overcome the motion to dismiss the political gerrymandering claim. Justice Stevens argued for a test based on such factors.[41] The State points out that the contention by the Jackson Plaintiffs mirrors the dissent of Justice Stevens, or is at least functionally identical to it, and that Justice Kennedy expressly rejected the "standards proposed . . . by our dissenting colleagues."[42]

We are persuaded that the Jackson Plaintiffs offer a standard for measuring an excessively partisan redistricting plan that is functionally equivalent to the standard offered in Justice Stevens's dissent, a view rejected by five Justices. This similarity aside, the Jackson Plaintiffs' equal protection analysis, assertedly a structural approach, fails on its merits. Specifically, they are unable to locate a substantive sight or suspect criterion to trigger strict scrutiny. Rather, they claim to rely upon the most deferential standard of review under the Equal Protection Clause, the absence of rationality.[43] Even more, they would alter rationality review to insist that justification for the plan require proof that a legislature that voluntarily engages in redistricting have purposes other than partisan

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[40] *Id.* at 272 (plurality opinion).

[41] *Id.* at 317-19 (Stevens, J., dissenting).

[42] *Id.* at 308 (Kennedy, J., concurring).

[43] *See, e.g., Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955); *cf. Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring) ("When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.").

advantage by offering a "compelling explanation." That is, of course, not rationality review.

The fact that the Texas legislature's redistricting plan replaced the court-drawn plan put into place after the 2000 census does not make the legislative plan invalid in light of *Vieth* because it was "solely" motivated by political motivation. As noted, the *Vieth* plurality rejected a "sole" motivation test as a basis for measuring when partisan influences on redistricting are impermissibly excessive. Although Vieth did not involve mid-cycle redistricting to replace an existing plan, there is no constitutional or statutory prohibition on mid-decade redistricting, as we explained in our earlier opinion rejecting plaintiffs' contention that Texas lacked the authority to draw new district lines to replace the court-drawn map put into place after the last census. In that opinion, we noted that "innumerable decisions have either assumed that a state legislature may draw new lines mid-decade or have invited a state to do so after the court has drawn a map in a remedial role."[44] For example, in *Wise v. Lipscomb* the Supreme Court observed:

> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan *pending later legislative action*."[45]

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[44] *Session*, 298 F. Supp. 2d at 460; *see id.* at 460 n.14, 461.

[45] 437 U.S. 535, 540 (1978) (emphasis added) (citation omitted); *see also Branch v. Smith*, 538 U.S. 254, 265-66 (2003); *Upham v. Seamon*,

(Continued on following page)

We also pointed to the practical solutions that Congress has available to prevent or limit such mid-cycle redistricting.[46]

As those on whose shoulders we stand, we suffer no illusion of commission or ability to cleanse the air of partisan politics and self-interest, or to otherwise make angels of men. Rather, we accept the common-sense understanding that any voluntary redistricting would not have been undertaken unless a majority of the legislature thought it would advance their interests. That is, the self-interest of members of the legislative body will inevitably be a "but-for" cause of voluntary redistricting, the only activity the Jackson Plaintiffs would now condemn. This condemnation is driven by the assumption that the self-interest of members is a proxy of partisan interest. Putting aside limited amendments to cure some inadvertent error made in adopting an extant legal plan, if the initiating force of partisan ambition is sufficient to strike down all that follows, the principle contended for forbids mid-cycle redistricting by judicial fiat, when neither Congress nor the State of Texas has done so. This would contradict the long-standing assumption by courts that a st te may replace existing court-imposed redistricting plans with plans enacted by the state's legislature.

Further, considering self-interest as a proxy of partisan purpose is forced. It does not accommodate the reality that a representative may act out of self-interest to secure a less competitive district – conduct that may or may not

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456 U.S. 37, 44 (1982); *Connor v. Finch*, 431 U.S. 407, 411-12 (1977); *White v. Regester*, 422 U.S. 935, 935-36 (1975) (per curiam).

[46] *Session*, 298 F. Supp. 2d at 474-75.

be beneficial to her party. Indeed it may be executed by a trade with a member of the opposite party equally actuated by the instinct of political survival.

In addition to making tendentious use of the equal protection standard and conflating the personal ambition of party members with partisan intent, the Jackson Plaintiffs' approach is question-begging in a more fundamental way. It does not escape, because it cannot, the absence of a substantive measure of fairness. It ends the inquiry into legality with a finding that the State acted with the sole purpose of obtaining partisan advantage for the controlling party, presuming that such action is irrational and impermissible regardless of its actual effects. This approach discounts the possibility that there may be rational justifications for attempting to redistrict to improve a party's position. For example, it is not clear that acting to undo a perceived *dis*advantage imposed previously by an opposing party is irrational in the sense that it admits of no salutary or constitutionally acceptable result.

In concept, the Supreme Court could announce a constitutional principle that acting solely with partisan purpose has no place in the drawing of districts. In implementing this principle, the Court could then adopt a prophylactic rule forbidding voluntary mid-cycle redistricting by state districting bodies controlled by one party – a bold but candid pronouncement, the *Miranda* of redistricting jurisprudence. The Jackson Plaintiffs shy from this step. Rather, they urge a "process," albeit one that admits of a single conclusion: that mid-cycle redistricting is unconstitutional. The inability to formulate an enforceable principle except one that gathers its normative content from an implementing rule both raises the question of justiciability and draws into question the legitimacy of the

announced principle. After all, it is a much smaller step from the two underlying building blocks of *Miranda* – the due process and Sixth Amendment-based right to not be convicted upon an involuntary confession and an experience-based factual judgment of the inherently coercive environment of the station house – to the implementing prophylactic of *Miranda*'s warning requirement. The baseline in *Miranda* was a settled constitutional principle, not an elusive condemnation of conduct that some would say is antithetical to American ideals and others would say is politics as old as the Republic itself.

The articulation of a constitutional principle here – such as condemning as irrational the drawing of district lines with the purpose (colored "sole," "dominant," "voluntary," or otherwise) of partisan gain – must face the facts of this case. While the present plan, drawn by a Republican Party majority in 2003, has been decried as egregious, the story must begin with the earlier map drawn by a Democratic Party majority in 1991. That plan, put in place following the 1990 census, was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other.[47] In 2000, the Democratic Party gerrymander was

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[47] *See, e.g.*, MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1510 (2003) [hereinafter BARONE 2004] ("The plan carefully constructs democratic districts with incredibly convoluted lines and packs heavily Republican suburban areas into just a few districts."); MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2002, at 1448 (2001) (describing it as the "shrewdest gerrymander of the 1990s").

Another commentator describes it as follows:

> The impact of political gerrymandering on the competitiveness of elections has not been given the attention it deserves. For example, following the 1990 census, Texas experienced what is sometimes referred to as "the great partisan gerrymander of

(Continued on following page)

still in place and, although Republicans now enjoyed substantial statewide majority strength, the results of the congressional elections favored Democrats by a seventeen to thirteen margin.[48]

The map drawn by this court in 2001 perpetuated much of this gerrymander.[49] It did so because this court was persuaded that it could not achieve "fairness" to political parties without some substantive measure of what is "fair." Simply undoing the work of one political party for the benefit of another would have forced this court to make decisions that could not be defended against charges of partisan decision-making – again, for the lack of a substantive standard. As the panel explained, it would follow only "neutral" redistricting standards.[50] Once the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas – such as placing the two gained seats in the areas of growth that produced them, following county lines, avoiding the pairing of incumbents and the splitting of voting precincts, and undoing transparent offsetting movements of the same number of residents between districts – the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote. Make no mistake, this

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'91." The Democrat-controlled legislature carefully created conservative districts around the Republican incumbents. This "packing" strategy helped the Democrats in the 1992 election to win 21 of the other 22 districts.

Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System*, 6 TEX. F. ON C.L. & C.R. 303, 337 (2002) (footnotes omitted).

[48] *See* Appendix.

[49] *See Balderas*, No. 6:01-CV-158, slip op.

[50] *Id.* at *5.

undertaking, while shorn of partisan motive, had political impact in the placement of every line.[51] The results of this court's plan did ameliorate the gerrymander and placed the two districts gained by Texas in the census count; however, doing more necessarily would have taken the court into each judge's own notion of fairness. The practical effect of this effort was to leave the 1991 Democratic Party gerrymander largely in place as a "legal" plan.[52]

Plaintiffs seize upon the targeting of certain incumbents in the present plan, Democrats who had been reelected even as their constituents voted for Republicans with increasing frequency. This was one of its most controversial features – egregiously wrong in the eyes of Democrats. In the eyes of Republicans, however, this feature was justified because the effect of the court plan was to perpetuate incumbency that was *itself* the product of a partisan gerrymander. Under the legislative plan, twenty-one Republicans and eleven Democrats were elected in November 2004.[53] While this was a substantial swing, the State urges that it actually better reflected the statewide voting strength of the parties than did the court plan; that the size of the swing only reflected the distortion caused

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[51] The difficulties of partisan decision-making do not go away as dominance by one party over the other is diminished. Non-competitive districts allocated among incumbents perfectly reflecting party strength as measured by their numbers of representatives are the likely outcome. This reality alone raises questions of the aptness of rules indexed by controlling parties acting in mid-cycle. Even if this foray were to enjoy some modicum of success, it leaves untouched the most common occurring occasion for partisan redistricting – the effort following the decennial census.

[52] Indeed, the 2002 congressional election totals were identical to the 2000 results, with the exception of the two new seats. *See* Appendix.

[53] *Id.*

by the gerrymandered plan it replaced.[54] That is, the displaced judicially-crafted plan of 2001, while easing the partisan outcome of the 1991 gerrymander, nonetheless left the minority party (Democrats) in control of the majority of the congressional seats.[55]

The State urges that the legislative purpose of the current plan was to remedy this unfair drawing – that its line-drawing was hardly "invidious." The State does not suggest that there is a constitutional right to proportionality,[56] or that one constitutional wrong justifies another. Rather, the State argues that this outcome is relevant to the Jackson Plaintiffs' contention that the present legislative plan is irrational as a matter of law. As Justice White explained in *Gaffney v. Cummings*,

> judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength. . . . [We do not] have a constitutional warrant to invalidate a state plan, otherwise within tolerable limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[57]

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[54] *See id.*

[55] *See id.*; *see also* BARONE 2004, *supra* note 48, at 1508 ("In U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001.").

[56] *See Vieth*, 541 U.S. at 288 (plurality opinion) (noting that "the Constitution contains no such principle: of proportional representation).

[57] 412 U.S. 735, 754 (1973).

In other words, the suggestion is not that escaping from one impermissible partisan gerrymander is a license to replace it with another, and we do not understand the State to argue as much here. Rather, it is that even by the "irrationality" measure proposed by the Jackson Plaintiffs, the current Texas plan is not an impermissible gerrymander at all.

It is instructive to compare the results of the Texas legislature's redistricting effort with the results of the redistricting plan enacted by the Pennsylvania legislature that the Court upheld in *Vieth*. In the 2000 general election, Pennsylvania voters elected eleven Republicans and ten Democrats to represent them in Congress.[58] In that same election, Republican Party statewide candidates

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[58] The following is a summary of the results of the last three election cycles in Pennsylvania:

Year	Statewide Strength		Pennsylvania Congressional Seats		
	R	D	R	D	Total
2004	46%	51%	12 (63%)	7 (37%)	19
2002	47%	50%	12 (63%)	7 (37%)	19
2000	49%	48%	11 (52%)	10 (48%)	21

See Bureau of commissions, Elections and Legislation, Pennsylvania Department of State, 2004 General Election Returns, *at* http://www.electionreturns.state.pa.us/ (last visited Apr. 1, 2005); bureau of commissions, Elections and Legislation, Pennsylvania Department of State, Archived election Results Selections, *at* http://web.dos.state.pa.us/cgi-bin/ElectionResults/elec_archive.cgi?which=Archive (last visited Apr. 1, 2005).

"Statewide Strength" was calculated by averaging the percentage of vote received by each party in all of the following races that occurred in Pennsylvania in a given year: Governor, Attorney General, Auditor General, and U.S. Senator. This provides a rough approximation of a party's general appeal statewide. *Cf.* Appendix.

captured an average of 48% of the statewide vote against 47% by Democratic Party candidates.[59]

Following the 2000 census, Pennsylvania's allotment of congressional seats was reduced from twenty-one to nineteen.[60] Pennsylvania's General Assembly then took up the task of drawing a new districting map. Under the plan that the Assembly produced, and which the Court ultimately upheld in *Vieth*, Pennsylvania voters elected twelve Republicans and only seven Democrats to Congress in the 2002 general election.[61] These results were repeated in the 2004 general election, giving Republicans control of 63% of Pennsylvania's congressional seats despite the fact that Republican statewide candidates captured an average of only 46% of the statewide vote against 51% for the Democrats.[62] In short, under the plan passed by the Pennsylvania General Assembly and upheld by the Court in *Vieth*, the party that garnered, on average, less than half the vote in statewide races was able to capture nearly two-thirds of Pennsylvania's congressional seats. In contrast, the plan passed by the Texas legislature resulted in the election of twenty-one Republicans and eleven Democrats to the House of Representatives in 2004, when the Republican Party carried 58% of the vote in statewide races and the Democratic Party carried 41% of the vote.[63]

The State's description of the 2003 Texas legislative plan as dismantling a prior partisan gerrymander that

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[59] *See* table, *supra* note 60.

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] *See* Appendix.

had entrenched a minority party, in order to allow a party with overwhelming statewide voting strength to capture two-thirds of Texas's congressional delegation, is a characterization that the record supports. Under the Jackson Plaintiffs' analysis, with its keystone declaration that partisan line drawing is *per se* irrational, if the Democrats in Pennsylvania were to obtain control of the state legislature, they could not then voluntarily undertake to undo the present map – even to bring Pennsylvania's congressional delegation more in line with the parties' apparent statewide strength – because they would be acting solely for partisan advantage. However, as we have explained, saying it is irrational, even saying it many times, does not make it so. And if the effects of the Pennsylvania plan did not provide a basis to find excessive partisanship in redistricting, it is hard to see how the effects of the Texas plan make it constitutionally offensive.

In short, the plaintiffs' contentions on remand are conspicuous for want of any measure of substantive fairness, one that can sort plans as "fair or unfair" by something other than a judge's vision of how the judiciary ought to work – more precisely, how the judiciary ought to run this show. We are persuaded that the inability of any plaintiff to conquer these difficulties, even when supported by able lawyers with an army of advisors, is explainable by the reality that this effort has been to give a legislative task to a court.[64]

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[64] Of course, to paraphrase Justice Harlan, the fact that a standard for justiciabiliy is not precisely definable does not mean that it is ineffable. *See Poe v. Ullman*, 367 U.S. 497, 524 (1961) (Harlan, J., dissenting). However, if such a standard simply is ineffable, we should

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C

Beyond the plaintiffs' inability to articulate a measure of substantive fairness, we are unable to locate in any of the proposals offered a clear articulation of the failures in governance to which courts are asked to direct their supervisory efforts. The plaintiffs persist in advancing claims that rest upon the perceived loss of individual rights by voters who, they allege, are victimized by impermissible classifications. The plaintiffs are unable to locate and address structural defects and conspicuously fail to connect their claims with the most visible awkwardness in today's electoral structure: the absence of competitive districts.[65]

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not be surprised by the inability of numerous talented individuals to define it.

[65] *See* Issacharoff & Karlan, *supra* note 16, at 544 n.17 ("[O]ne person, one vote's individualistic rhetoric may have come to obscure its original purposes of combating entrenchment and safeguarding majority rule."). This absence of competitive districts reflects the inversion of which Judge Ward wrote when he decried the phenomenon of representatives selecting their constituents. *See Session*, 298 F. Supp. 2d at 516 (Ward, J., concurring in part and dissenting in part) ("As in other contexts, extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa."); *see also* Issacharoff & Karlan, *supra* note 16, at 574 ("One way of thinking about this in terms of the constitutional structure of representation is that in the original Constitution, the Senate was picked by the state legislatures and the House was chosen by 'the people,' but that after a process of amendment and political adaptation, the houses have been inverted: now, the people pick the Senate and the state legislatures, through gerrymandering, pick the House." (footnotes omitted)); *supra* note 12 and accompanying text. For a delineation of the number of "safe seats" in each Congressional election between 1962 and 2004, *see* Appendix.

"Safe seats" protecting incumbent legislators flourish regardless of whether political parties are fighting for advantage, and appear even when "neutrals," not the legislators, are drawing the lines.[66] Indeed, as Justice O'Connor has observed, the rough and tumble of partisan politics may work against the proliferation of safe seats. Her prescient observation bears emphasis:

> Indeed, there is good reason to think that political gerrymandering is a self-limiting enterprise. In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat – risks they may refuse to accept past a certain point. Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious.[67]

Further, the creation and perpetuation of non-competitive districts can be facilitated by cooperation across the political aisle, as incumbents from each party negotiate to protect as much of their political turf as

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[66] That a judicially-approved plan could result in a majority of non-competitive districts is not surprising given that turning over the line-drawing process to independent commissions, as some states have done, does not necessarily avoid this result. *See* Steven Hill, Editorial, *Schwarzenegger vs. Gerrymander*, N.Y. TIMES, Feb. 19, 2005, at A29.

[67] *Bandemer*, 478 U.S. at 152 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring).

possible.[68] It is much like the oft-cited observation about the marketplace that when two or more competitors come together, the conversation will inevitably turn to price.

There are other forces that disconnect Texas voters from their "representatives," including one-person, one-vote. Texas is an increasingly urbanized state, with over 60% of its population concentrated in the large metropolitan areas of Houston, Dallas-Fort Worth, San Antonio, and Austin.[69] In drawing a map, the districts covering West Texas must reach eastward across hundreds of miles to gather sufficient population to meet the equipopulous requirement. These "reaches" must extend far beyond genuine communities of interest and come with a real risk here that West Texas farmers and ranchers will be represented in Congress by a person residing in one of the large metropolitan areas, creating a substantial disconnect between voters and their representatives. Again, this disconnect is facilitated in part by one-person, one-vote and the Voting Rights Act, both of which require map drawers to reach out for voters, departing from local

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[68] *See Gaffney*, 412 U.S. at 738-39 (addressing cooperative efforts by the two parties in Connecticut to carve up the landscape).

[69] *See* U.S. Census Bureau, U.S. Dep't of Commerce, Ranking Tables for Metropolitan Areas: 1990 and 2000, at http://www.census.gov/population/cen2000/phc-t3/tab03.pdf (Apr. 2, 2001), at tbl.3. The concentration of the Texas population can also be illustrated by comparing the census figures for the most populous and least populous counties in the state. According to the 2000 census, 45% of Texans live in five of the state's 254 counties. *See* U.S. Census Bureau, U.S. Dep't of Commerce, Census 2000 Summary File 1 (SF 1) 100-Percent Data, Geographic Area: Texas – County (8,458,627 out of total population of 20,851,820 live in Harris, Dallas, Tarrant, Bexar, and Travis counties), available at http://www.census.gov/census2000/states/tx.html. By comparison, only 2.6% of Texans live in the state's 100 least populous counties. *Id.*

communities tied by common economic pursuits and local tradition and creating opportunities for self-interested line drawing.[70] Specifically, in reaching out, the drawers are invited to select voters favorable to their own electoral chances – a temptation driven primarily by the self-interested desire to gain safe seats, not the secondary and more remote goal of achieving "partisan purposes." In effectuating this goal of safe seats, map drawers may choose to pull certain populations into their districts for a host of reasons: some areas may produce low voter-turnout; others may be dominated by agrarian interests; and yet others may be populated by several generations of the drawer's extended family.

Although plaintiffs argue that the districts under the 2003 Texas plan are non-competitive as a result of partisan gerrymandering, their argument and evidence assumes, but does not show, a necessary or actual correlation between partisan line drawing and an increase in the number of non-competitive Texas congressional districts. Again, the historical record is instructive. Texas has not held a congressional election for at least the past four and one-half decades in which more than a handful of districts were "competitive."[71] For most of this time, Texas was

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[70] *See* Michael W. McConnell, The Redistricting Cases: *Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 112 (2000) ("Both as a matter of state constitutional law and as a matter of custom, legislators used to be extremely reluctant to violate city, county, and township lines. Now, under 'one person, one vote,' they are required to do so. And once that constraint is lifted, they are liberated to snake lines all over the map to achieve their own purposes. The result, as Justice Harlan warned back in *Reynolds*, is an invitation to gerrymandering." (citing *Reynolds*, 377 U.S. at 622 (Harlan, J, dissenting))).

[71] *See* Appendix.

dominated by the Democratic Party at both the statewide and local levels. In many congressional races held during this time, the incumbent had no opponent.[72] Self-interest of incumbents controlled. As the Republican Party came to strength during the late 1980's and 1990's, the Democratic Party continued to hold a large majority of the congressional seats.[73] Even with the growing competitiveness between the parties, the number of non-competitive districts remained relatively constant.[74] The Democrats resisted the statewide growth in the number of Republican voters with its redistricting plan following the 1990 census.[75] It is important to understand that this partisan effort was greatly aided by the Voting Rights Act, in combination with the introduction in 1964 of the one-person, one-vote principle. The redistricting plan drawn following the 1990 census was the fruition of these requirements. By the time the plan now under attack was first proposed, the Voting Rights Act had effectively taken six Democratic Party seats off the table, rendering them untouchable and largely non-competitive. That is, only twenty-six of the thirty-two congressional seats allocated to Texas could be pursued by the Republican line drawers, who began their task with fifteen existing seats. To adhere to the goal of taking a share of the Texas delegation that, at a minimum, approximated its then-current state voting strength, the Republican Party had to hold its fifteen seats and pick up at least three or four of the remaining eleven seats. In sum, the 2003 Texas map drawn by the Republicans effectively

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See* supra note 48 and accompanying text.

achieved their goals during the 2004 election, but effected little change in the number of competitive districts. Texas has not had a significant number of competitive House races for at least the past four and one-half decades. The cases that guide our way do not provide a basis for us to hold that a redistricting plan's failure to change this long course of events is a basis to invalidate that plan.

D

The point is simple. It is difficult to set upon a course of treatment until the illness is diagnosed, and broad-spectrum responses have no place here – or should not. The Texas plan is not more partisan in motivation or result, including the impact on the number of competitive districts, than the Pennsylvania plan upheld in *Vieth*. The Jackson Plaintiffs have not identified a way to invalidate the Texas plan under the standards they urge as surviving *Vieth*. Yet, as the dissents and Justice Kennedy's concurrence in *Vieth* make clear, the disquiet with the role of partisan politics in redistricting persists, despite the difficulties in expanding the judicial role. The search for some judicial means to limit political gerrymandering takes us to the University Professors' suggestion that the principle of one-person, one-vote can serve this end. We now turn to that contention.

IV

The Amicus Curiae Brief of University Professors, which was supported in the main by all plaintiffs, seeks to apply the one-person, one-vote principle as a brake against excessive partisan redistricting by reducing the frequency of redistricting efforts. This argument, while present in

various forms throughout this litigation, was brought to the fore by the Professors' brief, taking its place alongside the contentions of the Jackson Plaintiffs.

The argument is easily stated. Each new decennial census immediately places many legislative bodies in clear violation of one-person, one-vote, requiring the drawing of new districts.[76] The process leading to a new plan may be extended for several years by court challenges and multiple legislative efforts, sometimes resulting in a court-promulgated plan. Although decennial census data is by that time no longer accurate, it is still used to draw the map. The use of this otherwise inaccurate data is sometimes described as a "legal fiction."[77] The Professors urge that this fiction is supported by the necessity of allowing

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[76] *See Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003) ("When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. . . . After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years. And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election."); *see also Reynolds*, 377 U.S. at 584 ("[I]f reapportionment were accomplished with less [than decennial] frequency, it would assuredly be constitutionally suspect.").

[77] *See, e.g., Georgia v. Ashcroft*, 539 U.S. at 489 n.2 ("[B]efore the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned."); *Johnson v. Miller*, 922 F. Supp. 1556, 1563 (S.D. Ga. 1995) (three-judge court) ("In the calculus of district population deviation, our only measure of the state's demographics is the decennial census. Since the population is not static, we adhered to the fiction that the census block figures are accurate to the exclusion of all others.") *aff'd, Abrams v. Johnson*, 521 U.S. 74 (1997); *see also People ex rel Salazar v. Davidson*, 79 P.3d 1221, 1233 (Colo. 2003) ("The United States Supreme Court has recognized the legal fiction that these figures remain accurate for the entire ten years between censuses.").

courts and legislative bodies to rely on the census figures without any demonstration of their present accuracy. This fiction, the argument continues, should not be enjoyed by a legislative body that voluntarily redistricts – that is, acts to replace a legal existing plan. In other words, dilution of the powerful command of one-person, one-vote should not be allowed when redistricting is not required by law. Pointing to the observation in our *Session* opinion of the practical values of a congressional prohibition of such voluntary redistricting efforts, the Professors urge that while that decision belongs to the Congress, not the courts, the enforcement of this constitutional principle is the obligation of the courts. They argue that it may be an alternative structural brake on partisan gerrymandering, conceding the present absence of a meaningful metric of substantive fairness – of how much partisan gain is too much – and declining to offer one.

The argument as presented comes unadorned with supporting case citations, relying upon the exacting principle of one-person, one-vote and the observation that the limit on partisan gerrymanders the Supreme Court is seeking is lying at its feet.[78] The simple logic of denying the benefit of the fiction that decennial census figures remain accurate throughout the decade to those who indulge in mid-cycle redistricting, together with the belief that here lies the most inviting ground for regulation, has given life to this argument.

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[78] The Court has only recently demanded exactitude in the population of districts drawn by the Georgia legislature for partisan gain. *See Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring). It did so in *Larios* by denying it the 10% toleration of deviation in the drawing of lines for state legislative seats.

The State replies that injecting one-person, one-vote at this juncture is beyond the scope of the mandate; that it has a tangential tie at best to the directive to reconsider in the light of *Vieth*; and in any event would be attended by its own coterie of practical problems of application.

In oral argument, Professor Scot Powe was modest in the claims he made concerning the effects of applying one-person, one-vote here, observing that even if requiring the State to demonstrate compliance with current numbers would offer only a small brake, it should be required. Viewed from this perspective, the strength of the argument does not rest upon its utility in curbing partisan excesses, although it might do so. Rather, the strength lies with the power of the proposed rule itself. It asks why a state legislative body under no legal requirement to redistrict should face anything less than the full reach of the constitutional strictures of one-person, one vote – that is, why it should benefit from a fiction born of necessity.

The University Professors deny that their rule would constitute a bar on a legislature that wants to replace a court-ordered plan before the next census is conducted. At the same time, they concede that their proposed rule would, by design, make it very difficult because only the decennial census figures provide sufficiently detailed and reliable data for redistricting.[79] They also acknowledge that "there is effectively no alternative" to decennial census data.[80] The State agrees, noting that "*Wesberry v.*

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[79] Tr. at 164.

[80] Univ. Prof. Br. at 4; *see id.* at 3 ("[U]se of population enumerations from the most recent federal decennial census is essential . . . because such recent census data is the most comprehensive, precise, and objectively attainable enumeration data available."). They point out

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Sanders requires essentially perfect equality between congressional districts. In practice, that high degree of mathematical precision would be all but impossible using any data other than decennial block-level data."[81] Judge Ward suggests in his concurrence that if a state wanted to pursue a mid-decade re-redistricting effort, it could perform a special state-wide census to provide the necessary numbers. Such a suggestion goes beyond what the parties recognized as within the realm of the practical or feasible. In their briefs and at oral argument, the litigants conceded that such data do not exist and could not practically be obtained. The proposed rule is intended to, and would, serve as a means to the end of preventing what Texas did here, to redistrict mid-decade to replace a court-imposed plan with one crafted by the legislature.

The practical effect of the rule would be to bar what courts have stated was within the prerogative of the state legislatures: to draw their own map to replace one imposed by a court. In none of these cases has a court suggested that the state legislature could not use the data from the last census, but instead had to conduct a special, statewide census, in order to replace a court-drawn map with a

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that some "[m]ore current, but incomplete information, such as population estimates . . . , or minority voter registration or turn-out" exists. *Id.* at 5. These data, however, would be "unacceptable as a basis for actually drawing district boundaries on a systematic, statewide basis." *Id.* Although other parties attempted to argue that they could rely on data showing county and city population trends since the census to show that the 2003 Texas plan was not equipopulous as of 2005, the University Professors as well as the State recognized that such data would not meet the legal requirements for drawing district boundaries. *See id.*; State Reply Br. at 41; Tr. at 69, 133, 137; *see also Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853-854 (5th Cir. 1999).

[81] State Reply Br. at 41 (citation omitted).

legislatively-drawn map.[82] The departure from what courts have assumed is the proper relationship between court-imposed plans and legislatively-enacted plans signals caution in endorsing the University Professors' proposed rule.

The University Professors assert that their proposed rule merely protects the fundamental right of people to elections conducted under maps that provide equal representation to equal numbers of persons. Yet it is difficult to discern how their proposed rule actually protects or furthers the one-person, one-vote principle, as opposed to the one-person, one-vote fiction. The Supreme Court has frequently observed that the decennial census is only briefly accurate, noting on one occasion that "the well-known restlessness of the American people means that population counts for particular localities are outdated

[82] The courts have assumed that legislative plans replacing court-imposed plans are expected to rely on the data from the last census, despite the passage of time. *See Johnson*, 929 F. Supp. at 1563 (upholding the Georgia State Senate redistricting plan that the legislature drew in 1995 using 1990 census data and acknowledging that "[a]t this point in the decade," the data for one-person, one-vote purposes "is largely theoretical. The real data, known only to providence, would doubtlessly lead us to another result."), *aff'd*, *Abrams v. Johnson*, 521 U.S. 74 (1997); *Terrazas v. Clements*, 537 F. Supp. 514, 516 (N.D. Tex. 1982) (implementing a temporary reapportionment plan based on 1980 census figures that would remain "in effect for all elections through December 31, 1983, unless valid apportionment plans are enacted sooner"); *Bush v. Martin*, 251 F. Supp. 484, 488 n.3 & 517 (S D. Tex. 1966) (tentatively approving a 1965 legislative redistricting plan based on 1960 census data, but noting that the Texas Legislature could adopt a plan before the next decennial census).

long before they are completed."[83] One of the University Professors has described

> [o]ne of the odder features of the one-person, one-vote doctrine, when applied to the population of electoral districts, . . . that it seemingly applies only in the first election cycle out of the (usual) five in any ten-year period. That is, the practical dynamics of population growth and mobility in the United States operate to assure that mathematically identical districts (by whatever measure) in the first election are almost certainly going to be different, often dramatically so, by the third or fourth election. Indeed, as a practical matter, this differentiation might be present even by the actual occurrence of the first election, which takes place two years after the enumeration on which the reapportionment will have been based.[84]

The University Professors do not explain how, in an election held in 2004, 2006, or 2008, the districts drawn in 2001 using 2000 census numbers are more equipopulous if measured against current actual population data than districts drawn in 2003 using 2000 census numbers. If the University Professors' application of one-person, one-vote is adopted, the virtually certain result would be to have the next elections conducted under the court-ordered plan drawn in 2001, using 2000 census numbers. Yet all recognize that the 2001 plan is no more a reflection of today's actual population distribution than the 2003 legislative

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[83] *Karcher v. Daggett*, 462 U.S. 725, 732 (1983); *see also Gaffney*, 412 U.S. at 745.

[84] Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1278 (2002).

plan; both are based on the 2000 census numbers. Neither plan would produce equipopulous districts for elections held in 2006, if those districts could be measured against current data. The difficulty in discerning how the University Professors' proposed rule in fact promotes one-person, one-vote underscores its actual purpose, of limiting mid-decade "voluntary" redistricting in order to limit political gerrymandering.

The University Professors' argument would insist on current population data only for voluntary mid-cycle efforts to redistrict. It is not clear, however, whether insistence on current population figures for voluntary redistricting could be so cabined. The combined effect of such a rule and the incentives of politics are difficult to predict. Indexing liability to voluntary redistricting could create large incentives to seek a judicial invalidation of an existing plan as violative of equipopulous requirements. If, as Judge Ward posits, a state can feasibly and practically obtain mid-decade census data that is sufficiently detailed and reliable to use in drawing district lines, the proposed rule may have the perverse effect of breeding more efforts to redistrict. Such data could provide not only a means to defend a "voluntary" re-redistricting plan, but also a basis to attack valid extant plans drawn using the decennial population data.[85] If one-person, one-vote is applied as the

[85] *Reynolds v. Sims* speaks generally about the frequency of legislative efforts to reapportion and the use of decennial census data toward the end of the decade. 377 U.S. at 583-84. Chief Justice Warren observed that "[r]eallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, often honored more in the breach than the observance, however." *Id.* at 583 (footnote omitted). He noted that, while acting only at the end of a decennial period leads to some imbalance in the population of districts, limitations on the frequency of these efforts are justified by the need for stability and

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University Professors advocate, and the ability to obtain reliable and detailed mid-decade census information does or will exist, then would mid-decade re-redistricting be required to meet the demand of one-person, one-vote applied in this fashion? Despite the assertions of its proponents, the actual bite of a rule denying reliance on decennial data to redistricting efforts voluntarily undertaken is both important and uncertain.

We recognize, with Judge Ward, the potential benefits of precluding mid-decade re-redistricting efforts. Judge Ward's citation to the legislative history of the 1976 Census Act amendments, noting that "constantly changing representative districts" is "bad politics, resulting in bad government," is instructive. Providing states with an incentive to obtain their own mid-decade census data to use in redistricting does not appear consistent with Congress's decree that federally-funded mid-decade data could not be used in redistricting because mid-decade redistricting was "bad politics." This history underscores Congress's authority to prohibit or limit discretionary redistricting efforts by the states.

The rule the University Professors and other plaintiffs propose would require us to apply an established doctrine in a novel way, with uncertain basis and effect. We add to these concerns the question of whether the entire contention is

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continuity in the legislative system. *Id.* The court's eye was, of course, on failures to reapportion, finding no difficulty with reapportioning *more frequently* than every ten years, while finding less frequent efforts to be suspect. *Id.* at 583-84; *id.* at 583 n.65 ("[T]he constitutions of seven . . . states either require or permit reapportionment of legislative representation more frequently than every 10 years."). Of course, the allocation of seats among the states rests on the decennial count. *See* 2 U.S.C. § 2a.

outside the mandate of the remand order. While it is true that *Larios* is relevant to this contention, the Court's order makes no reference to it. We do not wish to overstate any of these concerns viewed singly. Cumulatively, however, they counsel caution. We choose to abide that counsel and decline to adopt the University Professors' proposed rule.

V

The G.I. Forum, Congresswomen, and Texas-NAACP on remand return to their claims that the Texas plan impermissibly burdens minority voters in violation of the Voting Rights Acts and the Equal Protection Clause of the Fourteenth Amendment. Each would tie these claims to partisan gerrymandering. The contention is that these violations occurred in the effort to gain partisan advantage, however else the effort may be flawed. We examined and rejected all of the claims in detail in our previous opinion.[86] As these claims are beyond the scope of the mandate we are not persuaded that we should revisit them.

VI

Having reconsidered, we respectfully adhere to our judgment. We deny all relief requested by Plaintiffs and judgment is entered for Defendants.

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[86] *Session*, 298 F. Supp. 2d at 469-516. Judge Ward dissented from the panel's rejection of the claims that focused on changes made in Congressional District 23. *See id.* at 516-17 (Ward, J., dissenting). The panel was otherwise in full agreement.

APPENDIX

The following table was compiled from data provided by the Texas Secretary of State's Office as well as from the Texas Almanac, volumes 1962-1963 through 1992-1993.[87]

[87] *See* Office of the Secretary of State, 1992-2005 Election History, at http://elections.sos.state.tx.us/elchist.exe (last visited Apr. 1, 2005) and, *e.g.*, Texas Almanac 1992-1993 (1991).

We calculated "Statewide Strength" by averaging the percentage of votes garnered in all statewide elections occurring in a given year, including Governor, Lieutenant Governor, Attorney General, Comptroller of Public Accounts, Commissioner of the General Land Office, Commissioner of Agriculture, Railroad Commissioners, Texas Supreme Court, Texas Court of Criminal Appeals, U.S. Senator, and U.S. Congressman-at-Large.[88] For our purposes, this provides a rough approximation of a party's general appeal statewide.[89] We excluded the results for President from these figures.

The "Competitive" column tallies those seats that were competitive either in the general election or in the primary. We considered a seat to be "competitive" if it was won with less than 55% of the vote.[90] We first looked to the results of the general election, separating competitive from non-competitive races. For those races deemed non-competitive, we looked to the primary of the party whose candidate prevailed in the general election, and separated competitive and non-competitive races at the primary level.[91] We then tallied all competitive races identified at

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[88] After 1964, Texas no longer elected a Congressman-at-Large.

[89] *Cf. Vieth*, 541 U.S. at 288-89.

[90] *See* Richard H. Pildes, *supra* note 12, at 63 (defining competitive districts as those won with less than 55%) (citing David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 293, 304 (1974); GARY C. JACOBSON, THE ELECTORAL ORIGINS OF DIVIDED GOVERNMENT: COMPETITION IN U.S. HOUSE ELECTIONS, 1946-1988, at 26).

[91] If a primary race – or a general race in 1996 – went to a runoff, we used the figures from the runoff to determine competitiveness. However, were we to consider the presence of a runoff to be per se "competitive" the number of competitive seats would increase by 2 in

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both the general and primary levels to arrive at an overall measure for a given electoral cycle.[92]

The "Unopposed" column tallies those races in the general election with only a single party candidate – regardless of any third-party candidates.

The table below sets forth in further detail the data on competitiveness, broken down by party in the primary and general elections.

Year	General Election			Primary	
	Total Seats	Competitive		Competitive	
		R	D	R	D
2004	32	1	1	0	1
2002	32	1	3	2	0
2000	30	1	1	0	0
1998	30	0	1	0	0
1996	30	2	5	0	2
1994	30	1	4	0	0
1992	30	0	2	0	1
1990	27	0	2	0	0
1988	27	0	2	0	0
1986	27	1	0	1	0
1984	27	3	0	2	0
1982	27	0	2	0	2
1980	24	2	2	0	2

2004, 1 in 2002, 1 in 2000, 1 in 1998, 2 in 1996, 2 in 1984, 2 in 1982, 2 in 1978, and 1 in 1964.

[92] In 1996, thirteen of the districts were redrawn by a court, following a previous decision that some of those districts were the product of racial gerrymandering. *See Vera v. Bush*, 933 F. Supp. 1341 (S. D. Tex. 1996). Special elections open to all candidates were held and a number of runoffs resulted.

1970	24	1	4	0	1
1970	24	0	3	0	1
1974	24	1	1	0	1
1972	24	1	0	0	1
1970	23	0	0	1	1
1968	23	0	0	0	0
1966	23	0	1	0	3
1964	22	0	1	0	1
1962	22	1	1	0	1

Ward, J., specially concurring:

I concur in the result reached by the majority on the question whether any of the plaintiffs have set forth a standard for judging partisan gerrymandering claims which survived the holding of *Vieth v. Jubelirer*, 124 S.Ct. 1769 (2004). I write separately to explain in somewhat more detail why, if unconstrained by the scope of the Supreme Court's mandate, I would adopt the "one-person, one-vote" arguments initially presented by the Travis County parties and now urged on remand by the University Professors.

I

Justice Harlan warned that the Supreme Court's "one-person, one-vote" rulings might lead to more partisan gerrymandering efforts. He predicted that the Court's holdings requiring mathematical exactitude might encourage more drawing of district lines to maximize the political advantage of the party temporarily in control of the state legislatures. He also observed that "[a] computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues" *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J.,

dissenting). Those concerns have been realized. *See Vieth*, 124 S.Ct. at 1816 (Souter, J., dissenting) (citing, *inter alia*, Pamela S. Karlan, *The Fire Next Time. Reapportionment After the 2000 Census*, 50 Stan. L. Rev. 731, 736 (1998) (noting that "[f]iner-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders.")).

In Justice Breyer's dissenting opinion in *Vieth*, he noted that "[b]y redrawing districts every 2 years, rather than every 10 years, a party might preserve its political advantages notwithstanding population shifts in the State." *Vieth*, 124 S.Ct. at 1827 (Breyer, J., dissenting). By incorporating data from election cycles which post-date the most recent census data, a State under the control of a single political party may repeatedly fine-tune gerrymanders at the expense of the constitutional promise of one-person, one-vote. In *Session*, the court expressed a similar concern, stating: "[o]ur point is that if the judiciary must rein in partisan gerrymanders, limitations that focus upon the time and circumstance of partisan line – drawing and less upon the 'some but not too much' genre of strictures offer the best of an ugly array of choices." *Session v. Perry*, 298 F. Supp.2d 451, 475 (E.D. Tex. 2004). The rule advocated would require the State to demonstrate that a new redistricting plan does not worsen any population deviations existing among the current districts, denying the benefit of the fiction that the population reflected by the census remains accurate throughout the decade.

The rule is not a blanket prohibition on mid-cycle redistricting, as urged by the State. *See* State Defendants' Response Brief on Remand at 36 ("Plaintiffs' claims fail because they are an undisguised attempt at a backdoor judicial prohibition on 'mid-decade' redistricting, and this

Court has already correctly concluded that 'mid-decade' redistricting is legal and permissible"). The rule proposed involves a balancing of the State's authority to redistrict mid-decade with the voters' rights to equal representation in the Congress. The court is therefore correct to recognize implicitly that the "one-person, one-vote" and "mid-decade" arguments are distinct creatures. To be sure, the rule proposed in this case would make it more difficult for a State to exercise its authority to alter congressional districts repeatedly over the course of a decade, but it would not preclude it.

II.

A.

The majority questions whether the proposed rule (designed to curb the frequency of mid-cycle efforts) might breed even more efforts to gerrymander. The court is surely correct to raise that issue. But the majority does not explain why the *rule* as distinct from *politics* might encourage more redistricting. For my part, I am reminded of the practical observations of one court that politicians are not interested in redistricting "because of their innate attachment to mathematical exactitude." *Daggett v. Kimmelman*, 811 F.2d 793, 801 (11th Cir. 1987). Thus, it is unlikely that a State would engage in mid-cycle redistricting unless the party in power thought it could gain partisan advantage by doing so. Moreover, as a legal matter, the Supreme Court has held that initial plans adopted with the most recent census data comply with one-person, one-vote throughout the decade:

> When the decennial Census numbers are released, States must redistrict to account for any

> changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned.

Georgia v. Ashcroft, 123 S.Ct. 2498, 2515 n.2 (2003). This legal principle would doom lawsuits directed toward invalidating initial plans drawn with the decennial data. The rule urged by the University Professors does not *require* states to take any action above what is already mandated by existing Supreme Court precedent.

B.

The majority also suggests that the rule might not serve as a sufficient brake and that this counsels against adoption of the rule: "Despite the assertions of its proponents, the actual bite of a rule denying reliance on decennial data to redistricting efforts voluntarily undertaken is both important and uncertain". The majority is being bashful. No rule designed to police partisan gerrymandering could have less bite than *Bandemer*. As Justice Scalia noted in *Vieth*, the one case that upheld preliminary relief under *Bandemer* did not involve the drawing of district lines. In all cases involving the drawing of district lines, relief under *Bandemer* was refused. *Vieth*, 124 S.Ct. at 1778-1778 & nn. 5-6 (collecting cases). Contrary to the majority's suggestion, I am convinced that a requirement that a State demonstrate current population figures to comply with one-person, one-vote when replacing a valid plan would serve as a structural brake on partisan redistricting efforts.

The gerrymanderer's paraphernalia is the decennial census data, election results, and a powerful computer.

Although the parties do not explicate on the difficulty of deriving more accurate population data, the University Professors suggest (and the State recognizes) that such data do not currently exist. *See* University Professors' Brief at 4 ("After all, there is effectively no alternative."); State Defendants' Response Brief on Remand at 37 (" . . . it requires the State to show an up-to-date data set that the Professors say does not exist. . . ."). Neither the State nor the Professors explain that such data *could not* exist, only that it does not. The burden is, of course, on the State to make a good faith effort to achieve population equality among the districts, and it is unlikely that proof of such equality could be met solely with estimates or statistical sampling. *See Karcher v. Daggett*, 462 U.S. 725, 736 (1983) ("[T]he census data provides the only reliable – albeit less than perfect – indication of the districts' 'real' relative population level."); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316 (1999) (holding that Census Act prohibits use of statistical sampling methods to compensate for undercounting).

A State seeking to replace a valid plan in the middle of the decade might choose to conduct a special statewide census. Properly conducted, this effort would accommodate both the State's constitutional prerogative to redistrict mid-cycle and the voters' rights to districts that comply with one-person, one-vote principles. The State offers no principled reason for subordinating the latter to the former, and I can perceive none. What the State wants in this case is the right to rely on the federal census data to *facilitate* its efforts at partisan gerrymandering while failing to update the enumeration. This seems to me a perverse use of the data sanctioned by the Supreme Court

for use in efforts to *avoid* the dilution of individual votes cast in congressional elections.

C.

There are practical reasons to require the State to update the census data before embarking on mid-cycle redistricting efforts. Legislators know their districts, and cartographers are aware of what is happening on the ground in terms of demographics. Although the State asserts that "[t]he record does not show that the legislators took into account any post-Census population changes that had already occurred," State Defendant's Brief at p. 44 n. 30, the evidence cited by the Travis County parties from one of the architects of the map demonstrates that new CD4 was designed with an eye toward what was happening on the ground so that it could "grow into" a Republican district during the decade. Brief of Travis County and the City of Austin at p. 10; Tr. December 18, 2004, Afternoon Session, at pp. 177-178, Testimony of Phil King ("So this District 4, I think will grow Republican. That's one reason we drew it that way. Grayson and Collin counties are fast-growing Republican areas, so we felt like if we didn't win 4 now we'd grow into it"). This is one of the primary dangers of mid-cycle redistricting predicted by Justice Breyer in his dissent in *Vieth*. The rule proposed by the University Professors would require that districts designed with an eye toward what is happening on the ground be accompanied by proof that those districts were created in a good faith effort to achieve equal population.

In addition, cartographers in Texas who are either unable or unwilling to develop more current data risk diluting the strength of the fastest-growing segment of the

population, the Latino population. LULAC's brief, for instance, illustrates a comparison of the estimated populations of District 19, a predominately Anglo district, to District 28, a predominately Latino district. District 19 is growing at a much slower pace than District 28. To indulge the fiction of the accuracy of the census data under these circumstances encourages cartographers to use their knowledge of current demographics as well as voting trends exhibited through election cycles when drawing new maps. That legislators in some states might be disposed to use their knowledge of population shifts occurring after the release of the decennial numbers while gerrymandering during the initial round of redistricting is not a sufficient reason to shy away from the rule in this case. As Justice Souter explained in defending his effort to limit extreme gerrymanders: "[t]he most the plurality can show is that my approach would not catch them all." *Vieth*, 124 S.Ct. 1769 (Souter, J, dissenting).

III.

Although a rule denying the use of the decennial data is rooted in the Constitution, that rule enjoys the benefit of being consistent with what little statutory authority touches on the subject. The 1976 amendments to the Census Act authorized a mid-decade census for use in administering public benefit programs. *See* 13 U.S.C. § 141(d)-(g). One of the statutory provisions provides that:

> Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.

13 U.S.C. § 141(e)(2).

The purpose of the second clause of this provision was explained by its sponsors, who noted that the overall goal of the legislation was:

> to provide timely statistical information to assist the Federal Government in administering the allocation of finds under its various programs, assist States and local government in planning, and to assist the business community and the general public.

H.R. Report No. 94-944, at 17-18 (Supplemental Views of Representatives Edward J. Derwinski and Trent Lott). Representatives Derwinski and Lott explained that any issues that were extraneous to the legislation should be removed. *Id.* One of these extraneous issues was the possibility that some might use the federally-funded mid-decade data in redistricting efforts. Citing a 1971 paper prepared by the American Law Section of the Library of Congress, Representatives Derwinski and Lott recognized that Congress had the constitutional power to prohibit discretionary redistricting efforts attempted by the States. *Id.* In reliance on the 1971 paper, the Representatives concluded:

> Therefore, there appears to be a sound basis for the legislative action proposed in our amendment, but it also has the practical effect of avoiding the confusion to the public of having constantly changing representative districts. It is bad politics, resulting in bad government, to promote the continual shifting and drifting of congressional district lines.

Id. Representatives Derwinski and Lott therefore sponsored the amendment enacted as part of section 141(e)(2), which prohibited any reliance on mid-decade census data

Year	Statewide Strength		Congressional Seats				
	R	D	R	D	Total	Competitive	Unopposed
2004	58%	41%	21 (66%)	11 (34%)	32	3	7
2002	57%	41%	15 (47%)	17 (53%)	32	6	9
2000	59%	40%	13 (43%)	17 (57%)	30	2	9
1998	56%	43%	13 (43%)	17 (57%)	30	1	11
1996	55%	44%	14 (47%)	16 (53%)	30	9	1
1994	52%	47%	11 (37%)	19 (63%)	30	5	5
1992	49%	49%	9 (30%)	21 (70%)	30	3	5
1990	47%	51%	8 (30%)	19 (70%)	27	2	13
1988	47%	52%	8 (30%)	19 (70%)	27	2	13
1986	43%	56%	10 (37%)	17 (63%)	27	2	10
1984	51%	49%	10 (37%)	17 (63%)	27	5	9
1982	40%	59%	5 (19%)	22 (81%)	27	4	9
1980	45%	54%	5 (21%)	19 (79%)	24	6	4
1978	43%	56%	4 (17%)	20 (83%)	24	6	4
1976	38%	60%	2 (8%)	22 (92%)	24	4	6
1974	28%	70%	3 (13%)	21 (88%)	24	3	8
1972	45%	51%	4 (17%)	20 (83%)	24	2	11
1970	34%	66%	3 (13%)	20 (87%)	23	2	13
1968	31%	69%	3 (13%)	20 (87%)	23	0	12
1966	32%	67%	3 (13%)	20 (87%)	23	4	17
1964	29%	71%	0 (0%)	22 (100%)	22	2	0
1962	37%	63%	2 (9%)	20 (91%)	22	3	5

for redistricting purposes. The obvious assumption underlying this amendment was that congressional redistricting would have already occurred once in the decade by the time the mid-decade census was conducted.

Carried to its extreme, the State's logic in this case is that it has the Article I power to alter its congressional districts throughout the decade and it may rely exclusively on the decennial census data to discharge its one-person, one-vote obligations at any time during that period. But it makes little sense for the courts to permit a State to rely on federal decennial data throughout a decade when Congress has explicitly banned reliance on more current data that might be assembled in the middle of that decade. A rule denying reliance on the decennial data for voluntary redistricting efforts is therefore consistent with the Congressional policies embodied in section 141(e)(2) of the Census Act.

IV.

The State questions as "bizarre" any holding that would reinstate Plan 1151C over 1374C on the grounds that the former might be more equipopulous than the latter if used in the remaining elections. The State observes that the two plans rely on the exact same census data, and the State's population has shifted equally since the 2000 Census, regardless of whether Plan 1151C or Plan 1374C is in place. The State misses the point, however, of the argument. The former plan was born of necessity to bring the State into compliance with one-person, one-vote principles. The latter statute was born of a "single-minded purpose" of the Legislature to achieve partisan political gain. *Session*, 298 F. Supp. 2d at 470.

The Supreme Court requires States to utilize the census data to facilitate the constitutional voting rights guaranteed by *Wesberry*. That the data can be manipulated to other ends when used *in conjunction* with an effort to create equipopulous districts at the beginning of a decade is no justification for extending the protection afforded by the data to state legislatures which voluntarily embark on the task of redistricting for partisan political purposes.

V.

Although I concur in the result reached by the court with respect to the question whether the plaintiffs' proposed tests survived the holding in *Vieth*, I respectfully disagree with the court's suggestion that partisan gerrymandering is not to blame for the decreased competition in congressional races. To be sure, *bi*-partisan gerrymandering is also a culprit. *See* Samuel Issacharoff and Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 570-71 (2004). But surely one of the primary goals of Plan 1374C is to elect and entrench Republican congressmen, whatever the voting trends of the state's population might be.

Dr. Alford's declaration explains how gerrymanders of the sort presented in this case contribute to the lack of competitive elections. That declaration, tendered in support of the Jackson Plaintiffs' brief on remand, recounts the utter non-competitiveness of most of the districts under Plan 1374C. As readily admitted by the State, the design of Plan 1374C was to produce a 22-10 Congressional delegation in favor of the Republican Party. As Dr. Alford explains, the one surprise from the 2004 election cycle was how close the map came to producing those

numbers in the very first election conducted under the plan. Dr. Alford predicts that in the upcoming 2006 elections, one of the districts won by a Democrat, District 17, will be one of only a dozen or so truly competitive congressional districts in the country. As Dr. Alford has observed, Plan 1374C is not only a partisan gerrymander, but it is a very effective one, no doubt enabled in part by the architects' knowledge of the most recent election returns. Nevertheless, despite my disagreement with some of the language in the court's opinion, I am persuaded that the plaintiffs have not articulated a test which survived the holding of *Vieth*. I therefore concur in the result reached by the court that *Vieth* does not compel us to reach a different conclusion in this case.

VI.

In conclusion, I note that the majority and I agree on some very important points. First, the court's opinion observes that the University Professors' argument is a "narrower and seemingly more plausible contention" when compared to other efforts which attempt to measure the elusive concept of the fairness of redistricting plans. I agree. Second, the language of the majority opinion ("[w]e do not wish to overstate any of these concerns viewed singly") can hardly be construed as an endorsement of the State's arguments on the merits of this issue. With that view, I also agree. What tips the scale is the scope of the mandate.

The courts have marked time since *Bandemer*, while the partisan rancor exhibited in the redistricting process has grown to new levels. Justices Stevens and Breyer recently observed that:

> After our recent decision in *Vieth v. Jubelirer*, 541 U.S. ___, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength.

Cox v. Larios, 124 S.Ct. 2806, 2808 (2004) (Stevens, J. concurring). As the Travis County parties suggest in their brief on remand, this court's prior opinion did not give due consideration to their argument. Nevertheless, an inferior court's desire to end (or at least limit) this "bloodfeud," *Balderas v. State of Texas*, 6:01-CV-158, slip op., at 10 (E.D. Tex. Nov. 14, 2002), does not justify the exercise of judicial power arguably outside the scope of a higher court's directive.

It has not escaped my notice that the remand order in this case was issued after *Larios* but instructs this court to reconsider in light of only *Vieth*. The rule proposed by both the Travis County parties and the University Professors is grounded on principles of one-person, one-vote and is therefore more closely aligned with the holding in *Larios*. Given free reign to reconsider in light of the court's affirmance in *Larios*, I would not indulge the legal fiction that the census data remain accurate under these circumstances. I am persuaded that any shortcomings of the rule suggested by the majority are more perceived than real. Respect, however, for the scope of the mandate causes me to concur in the judgment denying relief at this time.[1]

[1] I continue to adhere to the remaining views expressed in my original opinion concurring in part and dissenting in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL	§	CIVIL ACTION
	§	NO. 2:03-CV-354
V.	§	(Filed Jan. 6, 2004)
	§	
RICK PERRY, ET AL	§	Consolidated

Before HIGGINBOTHAM, Circuit Judge, and WARD and ROSENTHAL, District Judges.

HIGGINBOTHAM, Circuit Judge, and ROSENTHAL, District Judge:

Various voters, members of Congress, the City of Austin, Texas, the GI Forum, the League of United Latin American Citizens ("LULAC"), and voters of Cherokee County challenge congressional redistricting set forth in Plan 1374C, enacted into law by the Texas Legislature on October 12, 2003,[1] and precleared by the Department of Justice on December 19, 2003. Plaintiffs[2] allege that Plan 1374C is invalid because (1) Texas may not redistrict mid-decade; (2) the Plan unconstitutionally discriminates on the basis of race; (3) the Plan is an unconstitutional partisan gerrymander; and (4) various districts in Plan 1374C dilute the voting strength of minorities in violation of § 2 of the Voting Rights Act.

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[1] 2003 Texas House Bill 3, 78th Leg., 3d C.S. (Oct. 12, 2003).

[2] To avoid unnecessary confusion, we will attribute the arguments raised against Plan 1374C to the Plaintiffs as a group. We recognize, of course, that each Plaintiff has brought distinct arguments to the table.

We hold that Plaintiffs have failed to prove that the State statute prescribing the lines for the thirty-two congressional seats in Texas violates the United States Constitution or fails to comply with § 2 of the Voting Rights Act. We also reject Plaintiffs' argument that the Texas Legislature lacked authority to draw new districts after a federal court drew them following the 2000 census.

We decide only the legality of Plan 1374C, not its wisdom. Whether the Texas Legislature has acted in the best interest of Texas is a judgment that belongs to the people who elected the officials whose act is challenged in this case. Nor does the reality that this is a reprise of the act of the 1991 State Legislature weigh with the court's decision beyond its marker of the impact of the computer-drawn map. This extraordinary change in the ability to slice thin the lines brings welcome assistance, but comes with a high cost of creating much greater potential for abuse. Congress can assist by banning mid-decade redistricting, which it has the clear constitutional authority to do, as many states have done. In Texas, the phenomenon is new but already old. The larger lesson of 1991 and 2003 is that the only check upon these grasps of power lie with the voter. But, perversely, these seizures entail political moves that too often dance close to avoiding the recall of the disagreeing voter. We know it is rough and tumble politics, and we are ever mindful that the judiciary must call the fouls without participating in the game. We must nonetheless express concern that in the age of technology this is a very different game.

Part I presents the factual background of the case. Part II addresses whether Texas had the legislative authority to draw new district lines mid-decade. Part III addresses generic claims that challenge the map as a

whole, namely, claims of racial discrimination and partisan gerrymandering asserted to be unconstitutionally extreme. Part IV lays out the legal principles governing our analysis of Plaintiffs' more specific claims. Part V addresses the § 2 vote dilution claims as directed toward the Dallas-Fort Worth area, as well as the other potential influence districts in East and Central Texas. Finally, Part VI addresses the § 2 vote dilution and *Shaw* claims directed at districts drawn in South and West Texas.

I

The U.S. Census Bureau released the 2000 decennial census in March 2001. As a result of its population growth, Texas was due two additional seats in the House of Representatives, bringing its total to thirty-two. Texas in turn had to draw thirty-two equipopulous districts to account for its additional representation and to meet the constitutional requirement of one man, one vote. Under Texas law, the Texas Legislature had the task of drawing the districts.[3]

Despite the imminency of state primary elections, the 77th State Legislature failed to adopt a redistricting plan. Lawsuits in state and federal court followed. Voters and others requested that the court draw a new map. The *Balderas* court deferred to state court efforts to adopt a state redistricting plan. When these state court efforts failed, we recognized that the State's existing congressional districts were unconstitutionally malapportioned

[3] *See Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001).

and reluctantly accepted the duty to prepare a new, constitutional plan.

Without a baseline state plan in place, the court invited the parties to submit redistricting recommendations. Following a bench trial, the panel applied neutral districting factors and adopted Plan 1151C to govern the State's 2002 elections. The panel refused suggestions not required by law and rejected policy choices better left to legislative consideration.

Balderas ultimately ordered that Plan 1151C would govern the 2002 congressional elections.[4] Certain plaintiffs representing Hispanic voters appealed the decision, arguing that the panel erred by not drawing an additional Hispanic district in the Southwest region of the state. The Supreme Court summarily affirmed.[5] As a result of the 2002 elections, the Texas congressional delegation included seventeen Democrats and fifteen Republicans. However, with their newly drawn state districts, legislative Republicans gained control over both houses of the Texas State Legislature, as well as control over all prominent Executive Branch positions.

The Texas Legislature revisited redistricting in 2003. The Legislature was unable to adopt a new plan during the 2003 regular session, in part because Democratic House members, by absenting themselves, denied a quorum. Governor Perry called the Legislature into special session. During the first special session, the House approved a new

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[4] *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2002), *aff'd mem.*, 536 U.S. 919 (2002).

[5] *Balderas v. Texas*, 536 U.S. 919 (2002).

congressional map, but the Senate failed to do so because its "two-thirds" supermajority rule permitted the Democrats to block a vote. To break the impasse, Lieutenant Governor Dewhurst announced that he would suspend operation of the two-thirds rule in any future special session considering congressional redistricting legislation. Although Democratic legislators again attempted to prevent formation of a quorum, the 78th Legislature ultimately was able to accomplish during its third special session what the 77th Legislature could not: pass a congressional redistricting plan, Plan 1374C.

II

Plaintiffs argue that Texas lacks the power, under either the Constitution or the election statutes, to redraw congressional districts in the middle of the decade. Some Plaintiffs find this limitation implicit in the text of the Elections Clause, while others urge that Congress has affirmatively limited state authority to redistrict by § 2c of Title II.[6] A third strain of arguments focuses on the *Balderas* judgment and asserts either that the judgment collaterally estops the State from enacting a new plan or that the judgment exhausted the State's authority to redistrict.

Although there are compelling arguments why it would be good policy for states to abstain from drawing district lines mid-decade, Plaintiffs ultimately fail to provide any authority – constitutional, statutory, or judicial – demonstrating that mid-decade redistricting is

[6] 2 U.S.C. § 2c (2003).

forbidden in Texas. In fact, what meager authority we have found seems to allow the states to redraw lines mid-decade, at least where a court drew the existing lines within the decade. As we will explain, the Elections Clause of the Constitution grants states broad power to regulate the "time, place, and manner of holding elections for Senators and Representatives."[7] Congress has the power to override state regulations or to impose rules of its own, but it has not chosen to limit redistricting to the period immediately following the release of the decennial census. Judicial decisions, both by the Supreme Court and by district courts throughout the country, have allowed and even invited states to redraw district lines following a court's action.

Against this backdrop of authority, we cannot agree that either the Constitution or the voting statutes restricts the states to once-a-decade redistricting. We therefore reject the argument that the Texas Legislature had no authority to draw the lines of congressional districts and deny Plaintiffs' Motion for Summary Judgment.

A

The Constitution of the United States delegates to states the power to develop procedures governing congressional elections by the Elections Clause. It provides:

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof;

[7] U.S. CONST. art. I, § 4.

> but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.[8]

This provision delegates to state legislatures both the power and responsibility to redraw congressional voting districts.[9] States do not possess this authority as an incident of their sovereignty. Rather, the Elections Clause delegates power to the states in broad terms. While states may only enact "time, places and manner" regulations, the text does not define or otherwise limit the states' discretion. Nonetheless, Congress may, if it chooses, make regulations governing the "times, places and manner" of holding elections or alter regulations enacted by state legislatures. This reservation to Congress, however, is not a direct limitation on the scope of the states' authority; rather, it allows Congress to override state election decisions or to enact regulations of its own. Unless and until Congress chooses to act, the states' power to redistrict remains unlimited by constitutional text.

Plaintiffs would read an implicit, temporal limitation into the text of the Elections Clause, but the argument is empty. The argument is that the Elections Clause allows Congress to pass laws regulating elections "at any time," but does not explicitly allow states to act at any time. Plaintiffs reason that, by failing to include the phrase "at any time" within the grant of power to states, the Elections Clause implicitly denies that power. Hence, they conclude, the Elections Clause allows states to draw

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[8] U.S. CONST. art. I, § 4.

[9] *See, e.g., Smiley v. Holm*, 285 U.S. 355, 366-67 (1932).

districts only once, immediately after the release of each decennial census.

We are unpersuaded. The argument tortures the text of the Clause, which by its clear terms has no such limitation. That Congress may exercise its power at any time says nothing of the states' power to enact election regulations, especially when the states are given this authority in terms that suggest no restriction beyond those that Congress may impose. To paraphrase the argument, if the Framers had intended to limit the states' power in such a specific way, surely they would have done so explicitly. This is just too convenient and tailored. For the first fifty years of our Nation's history, it was not uncommon for representatives to be chosen in statewide, at-large elections;[10] states often did not divide into congressional districts. The notion that the Elections Clause somehow embodies an implicit limitation on mid-decade redistricting is therefore anachronistic at best; presumably, it never entered the Framers' minds. Even today, there is no constitutional requirement that states must necessarily subdivide their territory into districts;[11] the requirement that states draw districts is largely a creature of statute.[12]

Even if the Elections Clause did not give states the power to prescribe election regulations at "any" time, Plaintiffs do not explain why we should read the Clause to allow states to exercise election power only one time after the census or how any such interpretation could find

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[10] *Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964).

[11] *Id.* at 8.

[12] *See* 2 U.S.C. § 2a, 2c (2003).

mooring in the text of the Constitution. What Plaintiffs ask us to do, then, is not simply to add a single limitation to the Elections Clause's grant of power; they ask that we create, out of whole cloth, a detailed scheme for states to exercise their constitutional authority. This we cannot do.

Judicial decisions have implicitly rejected the notion that a state may impose only one redistricting map each decade. While no court has, to our knowledge, explicitly addressed whether states have the power to do so under the Constitution,[13] innumerable decisions have either assumed that a state legislature may draw new lines mid-decade or have invited a state to do so after the court has drawn a map in a remedial role.[14]

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[13] The recent decision by the Colorado Supreme Court, *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), rests squarely on state law. That court did not hold that the U.S. Constitution limits states to once-a-decade redistricting.

[14] *See, e.g., Branch v. Smith*, 123 S.Ct. 1429, 1437 (2003) (affirming the district court's imposition of a redistricting plan, but noting that the district court's "alternative holding is not to be regarded . . . as binding upon state and federal officials should Mississippi seek in the future to administer a redistricting plan adopted by the Chancery Court"); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (observing the parties' argument "that because the District Court's plan is only an interim plan and is subject to replacement by the legislature in 1983, the injury to appellants, if any, will not be irreparable"); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan pending later legislative action." (internal citations omitted)); *Connor v. Finch*, 431 U.S. 407 (1977) (implicitly assuming that the state legislature could replace a "permanent" plan imposed by a district court); *White v. Regester*, 422 U.S. 935 (1975) (noting that Texas's

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The Supreme Court has intimated on several occasions that states may redistrict mid-decade following court action. In *Upham v. Seamon*,[15] the Court noted that the parties "urged that because the District Court's plan is only an interim plan and is subject to replacement by the legislature in 1983, the injury to appellants, if any, will not be irreparable."[16] Similarly, in *Branch v. Smith*, the Court noted that the district court's holding that state courts could not constitutionally create redistricting plans, a holding the Court vacated, was not "binding upon state and federal officials should Mississippi seek in the future

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legislative plan "does not become effective until the 1976 elections"); *Vera v. Bush*, 980 F.Supp. 251, 253 (S.D. Tex. 1997) ("Because the legislature has failed to act, this Court is left with the 'unwelcome obligation' of providing a congressional redistricting plan for the 1998 and millennial election cycles *pending later legislative action*." (emphasis added)); *Vera v. Bush*, 933 F.Supp. 1341, 1346, 1353 (S.D. Tex. 1994) ("Bullock and Laney contend that the Texas Legislature is ready and willing to redistrict during its 1997 regular session. Of course, in any event, they will have that opportunity, as this Court's remedy is an interim plan and the Court will require the legislature to prepare its own constitutional redistricting plan next year."); *Terrazas v. Clements*, 537 F.Supp. 514 (N.D. Tex. 1982) (implementing a temporary reapportionment plan that would remain "in effect for all elections through December 31, 1983, unless valid apportionment plans are enacted sooner"); *Bush v. Martin*, 251 F.Supp. 484, 517 (S.D. Tex. 1966) (tentatively approving a legislative redistricting plan, but noting that the Texas Legislature could improve the plan before the next decennial census: "We retain jurisdiction to enable the 60th Legislature, convening in January of 1967 and any special sessions convened through July 1967, to take further action. . . . Indeed, this very litigation in its advocative hammering out of the issues, possible standards, strengths and deficiencies of H.B. 67, has made a substantial contribution to the continuing legislative process and function as the Texas Legislature takes the second and sharper look.").

[15] 456 U.S. 37 (1982).

[16] *Id.* at 44.

to administer a redistricting plan adopted by the Chancery Court."[17] The Court's most vivid statement on the topic came in *Wise v. Lipscomb*:

> Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the federal court to devise and impose a reapportionment plan *pending later legislative action*.[18]

The Court's language contemplates that any federal court plan must give way to later legislative redistricting efforts. And, of course, the displaced plan here was judicially crafted. No legislative plan is being displaced.

Given this authority and the broad language of the Elections Clause, we conclude that the Elections Clause itself – the provision in the Constitution that grants states the authority to redistrict – does not limit states to redistricting once per decade, particularly where, as here, the State's action follows a court-imposed map. If any such limitation is to be found, then it must be found elsewhere.

B

Some Plaintiffs would locate limitations in other clauses in the Constitution, most notably the Census

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[17] 123 S. Ct. 1429, 1437 (2003).

[18] 437 U.S. 535, 540 (1978) (citing *Connor v. Finch*, 431 U.S. 407, 415 (1977) (emphasis added)).

Clause.[19] Those Plaintiffs point to two phrases which, we are told, prevent a state from redistricting any time it chooses. The Census Clause provides, in pertinent part:

> Representatives . . . shall be apportioned among the several States . . . according to their respective numbers. The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct.[20]

Plaintiffs argue that the phrase "according to their respective numbers" and the sentence requiring enumeration every ten years together impose affirmative limitations on the states' power to redistrict.

We disagree. The Census Clause by its terms applies to the apportionment of seats in the House of Representatives among the states. It ensures that no state is overrepresented in the House by linking each state's delegation to the state's population. The Clause says nothing about how district lines must be drawn. It is true, of course, that the Census Clause affects the states' obligation to redistrict. When the census is released every ten years, states are required to redistrict in order to accommodate changes in population and to bring its districts into conformity with the Equal Protection rule of one man, one vote. But the Census Clause does not expressly limit the states' ability to redistrict more frequently. Indeed, the Census Clause does not mention the states or their power

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[19] U.S. CONST. art. 1, § 2, cl. 3.

[20] U.S. CONST. art. I, § 2, cl. 3.

to redistrict,[21] and we fail to see how it can limit a power it never references.

Plaintiffs concede that the constitutional text itself is silent regarding repeated reapportionment. They nonetheless insist that the Supreme Court's decision in *U.S. Term Limits, Inc. v. Thornton*[22] prevents States from "adding" to the Constitution a provision entitling states to redistrict mid-decade. Plaintiffs' reliance on *U.S. Term Limits* is misplaced.

U.S. Term Limits was not based on the Elections or Census Clauses, but on the Qualifications Clause of Article I.[23] In *U.S. Term Limits,* the Court rejected an effort by Arkansas to impose term limits on its Representatives because a state cannot add qualifications to those enumerated in the Constitution. The Court noted that, "in certain limited contexts, the power to regulate the incidents of the federal system is not a reserved power of the States, but rather is delegated by the Constitution."[24] "In the absence

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[21] Plaintiffs' argument depends, to some extent, on the assumption that states are required by the Constitution to draw district lines. This assumption, however, is unfounded. As we noted above, in the early years of this nation, many states did not draw district lines, but rather used statewide at-large districts. Since the Constitution itself does not require a state to draw district lines, it is difficult to see how the Census Clause could limit the states' power to redistrict.

[22] 514 U.S. 779 (1995).

[23] Article I, Section 2, Clause 2 specifies that "[n]o person shall be a Representative who shall not have attained to the Age of twenty five years, and been seven Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

[24] *U.S. Term Limits,* 514 U.S. at 805.

of any constitutional delegation to the States of power to add qualifications to those enumerated in the Constitution, such a power does not exist."[25] Drawing on this language, Plaintiffs urge that, by undertaking mid-decade redistricting, Texas has in effect "added" to the text of the Elections Clause a power to redistrict intradecenially.

We disagree. As a preliminary matter, Texas has "added" nothing to the text of the Constitution by redrawing its district lines mid-decade. The Elections Clause is a broad grant of authority to the states that is checked only by the power of Congress to make or alter voting regulations. Nowhere in the text of the Elections Clause or in judicial interpretations is there a limitation of the frequency with which states may exercise their power. Since the power given the states is broad enough to encompass mid-decade redistricting, it cannot be fairly said – as Plaintiffs assert – that Texas has "added" anything to the Constitution's text. *U.S. Term Limits,* by contrast, dealt with a very different situation. It dealt with the Qualifications Clause, a provision that is of a "precise, limited nature."[26] By adding a term limit, Arkansas engrafted a provision into the Qualifications Clause that was not there before. The same cannot be said here. The Qualifications Clause in *U.S. Term Limits* by its terms gave the states no role to play in setting the qualifications of representatives.[27] The Elections Clause is different: it appeals to both

[25] *Id.*

[26] *Id.* at 796.

[27] Indeed, because Article I, Section 2 specifies that "the *Electors* in each State shall have the Qualifications requisite for Electors of the

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state legislatures and Congress to set the "time, manner and place" of holding elections. When a state exercises this authority, it adds nothing to the Constitution.

Fairly viewed, it is Plaintiffs who seek to "add" to the Constitution. They ask us to add an implicit limitation to the Elections Clause that states may prescribe the "times, places and manner" of holding elections only after each decennial census. There is no basis for this addition, either in the text of the Constitution or in court decisions interpreting it. In sum, neither the Census Clause nor the Qualifications Clause limits state power to redraw district lines intradecennially.

C

The Elections Clause grants Congress the power to pass voting regulations or to alter voting regulations enacted by the states. Several Plaintiffs argue that Congress has exercised its power to limit the authority of the states to redistrict.

The most relevant statutory provisions are in Title 2. Section 2a specifies that the President must inform Congress after each decennial census of the population of each state and the corresponding number of representatives each state is entitled to send to the House of Representatives.[28] Section 2c requires every state entitled to more

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most numerous Branch of the State Legislature," the failure to give the states power over representatives' qualifications is all the more telling.

[28] Section 2a reads in pertinent part:

> On the first day, or within one week thereafter, of . . . each fifth Congress thereafter, the President shall transmit to the

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than one representative under these census figures to create a number of districts equivalent to the number of representatives it sends to the House.[29]

Congress has given courts a significant role in redrawing district lines. Should a state legislature not redistrict after the decennial census, for example, a court is empowered to remedy any defects in the state's maps.[30] At the same time, the Supreme Court has emphasized that primary responsibility for drawing the lines of congressional districts remains with state legislatures.[31] The Court has reaffirmed this principle in a series of decisions constraining federal courts in redistricting cases. The Court, for example, insists that the judiciary defer to

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> Congress a statement showing the whole number of persons in each State . . . as ascertained under . . . each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

2 U.S.C. § 2a (2003).

[29] Section 2c provides in pertinent part:

> In each State entitled . . . to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . .

2 U.S.C. § 2c (2003).

[30] *Wise v. Lipscomb*, 437 U.S. 535, 539-540 (1978); *Connor v. Finch*, 431 U.S. 407, 415 (1977).

[31] *Branch v. Smith*, 123 S.Ct. 1429, 1435 (2003); *Growe v. Emison*, 507 U.S. 25, 34 (1993).

legislative districting if the legislative plan meets population equality and racial fairness standards applicable to court-ordered plans.[32] In addition, the judicial role is remedial; courts are not to replace valid legislative judgments with their own preferences.[33] Absent evidence that a state will fail to perform its redistricting duty in a timely fashion, a federal court can neither obstruct the State's redistricting efforts nor allow federal litigation to impede it.[34] Similarly, courts conducting redistricting are obliged to honor the State's redistricting traditions.

Plaintiffs assert that § 2c constrains the power of states to redraw district lines at will. Their argument comprises three basic steps. First, in § 2c Congress revoked the power granted to state legislatures by the Elections Clause and delegated a far more limited power. Second, they urge that § 2c allows redistricting once after the decennial census. As a result, they urge that when *Balderas* imposed Plan 1151C, the judgment effectively "used up" the redistricting power delegated to the states through § 2c. Under this view, Plan 1374C is invalid

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[32] *Upham v. Seamon*, 456 U.S. 37, 39 (1982).

[33] *Id.* ("We have never said that the entry of an objection by the Attorney General to any part of a state plan grants a district court the authority to disregard aspects of the legislative plan not objected to by the Attorney General. There may be reasons for rejecting other parts of the State's proposal, but those reasons must be something other than the limits on the court's remedial actions. Those limits do not come into play until and unless a remedy is required; whether a remedy is required must be determined on the basis of the substantive legal standards applicable to the State's submission.").

[34] *Branch*, 123 S.Ct. at 1435.

because Texas had no power to enact it once *Balderas* installed Plan 1151C.

We are not persuaded. First, we cannot agree that by passing § 2c, Congress revoked the authority granted states by the Elections Clause. To be sure, § 2c constrains the redistricting decisions that states can make, but it cannot fairly be said to revoke the states' power. Plaintiffs advance a specie of preemption argument: that by passing legislation that relates in some way to congressional districting, Congress has effectively usurped the entire redistricting field.

This interpretation of § 2c ignores the text of § 2c and misreads the Elections Clause. Section 2c has no language suggesting that Congress is "revoking" the authority granted by the Elections Clause, or even that Congress is "redelegating" a more limited authority. If Congress wishes to revoke the states' redistricting authority, it must do so clearly.[35] Moreover, Plaintiffs' argument tacitly assumes that any congressional regulation relating to election procedures automatically revokes the broad authority given states under the Elections Clause. The structure of the Clause, however, suggests that the primary source of election regulation is state law, federal law supplementing state procedures or overriding them only when necessary. Reading § 2c for what it is – a congressional

[35] To put the argument in slightly different terms, had the Framers intended to deprive states of authority to regulate whenever Congress spoke on the subject, they would surely have phrased the Elections Clause differently. For example, the Framers could have written: "The legislatures of the states may prescribe the time, places and manner of holding elections *until* Congress does so."

regulation imposing a single election requirement on the states – preserves the relative roles of Congress and the states under the Elections Clause.

Second, even if § 2c did somehow revoke and redelegate redistricting authority, we disagree that § 2c would allow redistricting only on the decennium. Plaintiffs base their argument on the text of § 2c, which provides in pertinent part:

> In each State entitled . . . to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title [the decennial census], there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative. . . .[36]

Plaintiffs argue that this provision directly links the "time" at which the state must redistrict to the "mode" in which it must exercise its redistricting power. That is, the clause requiring states to establish districts immediately follows the reference to the decennial census.[37] Plaintiffs also reference several other federal statutes imposing "time" and "manner" restrictions, apparently in an effort to bolster the notion that federal law restricts a state's ability to redistrict frequently.

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[36] 2 U.S.C. § 2c (2003).

[37] Plaintiffs also cite to the Supreme Court's decision in *Utah v. Evans*, 536 U.S. 452, 461 (2002), presumably in an effort to bolster their linkage argument. *Evans*, however, does not discuss whether federal law limits the frequency with which a state can redistrict.

While it is true that states are under an obligation to redistrict after each census, we find nothing in § 2c that limits the frequency with which they may do so. It would have been remarkably easy for Congress to impose such a limitation in the text of § 2c, but it did not. It merely required states with more than one representative to divide their territory into a like number of districts.[38] Other courts have similarly failed to find such a limitation in § 2c. As we noted above, numerous courts have either allowed or invited state legislatures to enact redistricting plans in the middle of the decade when a court has previously imposed a plan.[39] Section 2c was in force when each of these decisions was handed down.

The final step in Plaintiffs' § 2c argument is similarly flawed. Plaintiffs conclude that *Balderas*, by establishing a constitutional redistricting plan, "used up" the state's constitutional authority to redistrict. Plaintiffs frame their argument by again focusing on the meaning of § 2c – which, they assert, reveals that court redistricting is constitutionally "equivalent" for purposes of Article I, Section 4 to state legislative redistricting.[40] We agree that

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[38] Incidentally, there is no question that Plan 1374C complies with this requirement.

[39] *See supra* note 14 and accompanying text.

[40] To reach this conclusion, Plaintiffs first observe that § 2c is "just as binding" on the courts as it is on state legislatures. Second, when a federal court creates congressional districts under § 2c, it necessarily does so in the manner provided by state law. Finally, § 2c is a valid exercise of Congress's reserve power under the Elections Clause. Taken together, these three principles are said to prove that court-drawn districts are "functionally equivalent" to congressional districts drawn by state legislatures through the exercise of the power by Article I, Section 4, cl. 1.

court-drawn maps are functionally equivalent to legislative maps, although there are key differences between the two. But our agreement on this point is of little help to Plaintiffs because they fail to persuade that a state cannot redraw district lines after a valid court-imposed plan is in place. That is, *Balderas* could only "use up" the State's constitutional authority to redistrict if the state is somehow constrained to draw district lines only once per decade. We have rejected Plaintiffs' argument that redistricting following a judicially imposed plan is forbidden, and we do not reach Plaintiffs' *Balderas* claim.

D

Plaintiffs also assert that Texas "tradition" prevents the State Legislature from redrawing district lines in the middle of the decade. They argue that, under Supreme Court precedent, the State Legislature was bound to follow its traditional redistricting principles in creating a new map. Since Texas does not have either a history or tradition of mid-decade redistricting, Plan 1374C is said to be invalid.

Plaintiffs' argument misreads Supreme Court precedent. Although the Supreme Court has required *courts* to use a state's "districting traditions" when drafting voting maps, the Court has never held that a state *legislature* is bound to follow its prior districting practices indefinitely. Indeed, "tradition" normally fills a very different role in redistricting suits.[41] Plaintiffs cite two Supreme Court

[41] Initially, the Court used tradition as a lens through which charges of racial gerrymandering are analyzed. Thus, in *Easley v.*

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decisions, *White v. Weiser*[42] and *Branch v. Smith*,[43] to support their argument, but neither decision holds that states are bound to follow state tradition in drawing maps. In *White*, the Supreme Court held that *federal courts*, not state legislatures, must abide state districting traditions; the Court iterated that legislatures, not courts, have "primary jurisdiction" over reapportionment, and reinforced the notion that court intervention in the redistricting process is meant to be minor and remedial.[44] *Branch v. Smith* is also inapposite. In *Branch*, the Court attempted to reconcile § 2c with the seemingly conflicting requirements of § 2a(c)(5).[45] The Court explained that when a "federal court redistricts a State in a manner that complies with that State's substantive districting principles, it does so 'in the manner provided by the law thereof.'"[46] Plaintiffs cite this passage as evidence that states are constrained by tradition. Presumably, their argument is that since the Court held that a federal court redistricts

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Cromartie, 532 U.S. 234 (2001), the Court reiterated that "that those who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'" 532 U.S. 234, 241 (2001) (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995)).

[42] 412 U.S. 783 (1973).

[43] 123 S.Ct. 1429 (2003).

[44] *White*, 412 U.S. at 795.

[45] Section 2a(c)(5) requires that representatives shall be elected in at-large elections "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," whereas § 2c requires states to be divided into single-member districts and prohibits courts from ordering at-large elections. *See* 2 U.S.C. §§ 2a(c)(5), 2c.

[46] *Branch*, 123 S. Ct. at 1444 (citations omitted).

"in the manner provided by the law [of the state]" only when it follows the state's districting traditions, so too a state legislature can only redistrict "in the manner provided by the law [of the state]" when it follows the state's districting traditions. Plaintiffs misread this passage. *Branch* does not hold that a state must follow its redistricting traditions without deviation. Rather, the passage is focused solely on the power of federal courts. It specifically holds that if a federal court redistricts a state using the state's traditions and preferences, the court does so "in the manner provided by the law" of the state, such that § 2a(c)(5)'s requirement that at-large districts be used is not invoked.

In any event, it would be illogical to require a state legislature to adhere strictly to the state's districting principles whenever it undertook to redraw the state's map. Any such rule would, in effect, freeze the state's districting traditions in place.[47] We can find no reasoned basis for such a rule.[48]

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[47] Technically, the state would be bound to follow whatever districting traditions were in force as of the passage of § 2c.

[48] As further evidence of Texas's districting "traditions," Plaintiffs assert that the Texas Constitution bars mid-decade redistricting. We have already rejected the notion that the Texas Legislature is limited by its own traditions; therefore, we need not address this constitutional assertion. However, even if Texas's own traditions did limit the Texas Legislature, Plaintiffs have shown this court nothing in the Texas Constitution that would limit mid-decade redistricting. The State has not questioned this court's authority to enforce state law against the State of Texas. Given our finding that state law is no prohibition to mid-decade redistricting, we have no occasion to face the jurisdictional issue sua sponte.

(Continued on following page)

The Texas Constitution does not explicitly allocate responsibility for drawing congressional districts. Plaintiffs point to this fact and argue that without an affirmative constitutional grant allowing the Legislature to undertake mid-decade redistricting, it may not do so. Plaintiffs' argument fails, however, precisely because the Texas Constitution is altogether silent on the topic of congressional redistricting. That is, not only does it not explicitly give the State Legislature the power to redistrict *mid-decade*; it does not explicitly give the State Legislature the power to draw congressional districts *at all*. Yet there is no doubt under Texas law that the State Legislature is in fact empowered to draw congressional district lines. The Texas Supreme Court reached this precise conclusion in *Perry v. Del Rio*, 67 S.W.3d 85, 91 (Tex. 2001), and numerous other courts have implicitly reached the same conclusion. It is well-established under Texas law that the Texas Legislature may legislate in any area not specifically proscribed by the Texas Constitution. Since the Texas Constitution does not deprive the Legislature of the power to pass congressional redistricting plans mid-decade, the Legislature has the power under Texas law to enact redistricting schemes intradecenially.

Although the Texas Constitution does not explicitly allocate the power to draw congressional districts, Article III, § 28 does address redistricting for state legislative districts. It requires the Texas Legislature to draw state representative and senatorial districts at its first regular session after the publication of the decennial census. If the Legislature fails to do so, § 28 confers the responsibility on a special body, the Legislative Redistricting Board.

Section 28 is generally thought to apply only to state legislative redistricting, but Plaintiffs assert that it applies to congressional redistricting as well, by analogy if not directly. Plaintiffs argue that § 28 prevents the Legislature from redrawing district lines mid-decade. For support, they point to a provision in the Texas Constitution of 1876 that limits the Texas Legislature to once-a-decade redistricting. While this provision was removed from the Constitution by an amendment to Article III, there is evidence that the 1876 provision remains in force.

The difficulty is that Plaintiffs ask us to do more than just apply Article III, § 28. They ask that we restore a provision removed over 100 years ago, apply it beyond its plain text to congressional redistricting, and strike down in the name of state law the first redistricting plan passed by the State Legislature since 1991. We are aware of no Texas case that has ever directly held that Article III, § 28 applies in full to

(Continued on following page)

E

Plaintiffs' final argument focuses on the effect of the *Balderas* judgment. They argue that *Balderas* was a final judgment that is binding on the State because it was a party to the proceeding. They argue that the State in enacting Plan 1374C is attempting to avoid the judgment in that case, and that the State is collaterally estopped from contesting the use of Plan 1151C.

The prerequisites for collateral estoppel are not met here. Issue preclusion has four basic requirements: (1) the issue must be identical to an issue involved in prior litigation; (2) the issue must have been fully and vigorously litigated; (3) the issue must have been necessarily decided in the prior litigation; and (4) special circumstances must not render preclusion inappropriate or unfair.[49] The first two requirements are not met here. It is true, as Plaintiffs argue, that the two majority-minority districts – Districts 18 and 30 – are involved in both cases, as are several other features of the two plans. But the *Balderas* court's tasks were different: it had to bring the district map into line with the equal population rule, while accommodating the two new congressional districts and obeying the Voting Rights Act. The issues are different

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congressional redistricting; all Texas decisions of which we are aware have assumed that § 28 does not control. And the Texas Attorney General Opinion Letters that Plaintiffs cite to bolster their argument also do not opine that Article III, § 28 applies in full to congressional redistricting. The letters address the State's duties under Article III, § 28 without addressing the Legislature's power to draw congressional districts.

[49] *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 391 (5th Cir. 1998).

here. We must first decide whether the State has the constitutional power under the Elections Clause or § 2c to redraw district lines mid-decade. This issue did not arise in *Balderas*. We also must examine a never-before-considered legislative districting plan, Plan 1374C, and decide whether it passes muster under the Constitution and the Voting Rights Act. We find no merit in Plaintiffs' collateral estoppel argument.

F

Perhaps the most compelling arguments offered by Plaintiffs against mid-decade redistricting focus on the impropriety – rather than the illegality – of frequent redistricting. A significant portion of Plaintiffs' arguments raise policy concerns. For example, Plaintiffs argue that frequent redrawing of district lines will undermine democratic accountability and exact a heavy cost on state independence as federal congressional leaders exert their influence to shape state districting behavior.

As persuasive as these arguments may be, they are directed to the wrong forum. If Congress chooses to ban intradecennial redistricting, it has the power to do so under the Elections Clause. We have found no provision in either the U.S. Constitution, federal law, or state law that proscribes mid-decade redistricting, and our mandate ends there.

G

We deny Plaintiffs' Motions to Dismiss and Motions for Summary Judgment on the issue of mid-decade redistricting and collateral estoppel.

III

Turning to the merits, we will first consider Plaintiffs' claims in their two most sweeping forms. First, Plaintiffs argue that the proposed plan must be set aside in its entirety because it is laced with impermissible racial discrimination against Blacks and Latinos in violation of the Equal Protection Clause of the United States Constitution. Second, they allege that Plan 1374C is an impermissible partisan gerrymander. After addressing these allegations, we will then discuss a kindred but "analytically distinct claim" of racial discrimination under the Equal Protection Clause that in the drawing of various districts the Legislature was predominately motivated by race. We will reject the broad-based claims at the outset and return to these *Shaw* claims in our consideration of the more focused claims under § 2 leveled against specific districts. That process will amplify the findings that underpin our conclusion that Plaintiffs have failed to prove purposeful racial discrimination.

A

Since *Washington v. Davis*,[50] a claimed denial of Equal Protection has required proof that discrimination was purposeful; differential or adverse impact alone is not sufficient. In *Davis*, the Supreme Court considered an employment discrimination claim brought under the Equal Protection Clause in the District of Columbia before Title VII was extended to the District. Writing for the Court, Justice White rejected the argument that a party

[50] 426 U.S. 229 (1976).

alleging racial discrimination under the Equal Protection Clause could focus solely on the racially differential impact of the challenged state practice.[51] He explained that the Court had "never held that the constitutional standard for adjudicating claims of invidious racial discrimination [was] identical to the standards applicable under Title VII,"[52] which in certain circumstances allowed the adverse impact upon a protected minority to constitute sufficient proof of a statutory violation. He concluded that the Equal Protection Clause required more; it demanded proof that the challenged state action was intended to be discriminatory. *Davis* marked only the first step in the Court's analysis of Equal Protection claims, and in its wake came a range of questions, including questions about the allocations of the burden of proof and about the character of proof demanded by the requirement that racial discrimination be purposeful.

The next term, in *Arlington Heights v. Metropolitan Housing Corp.*,[53] the Court repudiated the Seventh Circuit's emphasis on the adverse impact of a challenged zoning decision in a Chicago suburb, rather than its purpose. Writing for the majority, Justice Powell – while acknowledging that proof of purpose would seldom be easy – explained that it was not necessary to prove that a decision was motivated by a single concern, or even that a particular purpose was the dominant or primary one. There need only be proof "that a discriminatory purpose

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[51] *Id.* at 239.

[52] *Id.*

[53] 429 U.S. 252 (1977).

has been a motivating factor in the decision."[54] The inquiry, he explained, may start with the impact of the legislative act, which while not alone sufficient to prove purpose remains relevant, and continue to the exploration of the act's history, including any contemporary statements by members of the decision-making body.

Two years later in *Personnel Administrator of Mass. v. Feeney*,[55] the Court upheld a Massachusetts statute granting lifetime preferences to veterans for civil service positions. The Court rejected claims that because few women could qualify, the statute discriminated against women in violation of the Equal Protection Clause. Writing for the majority, Justice Stewart pointed to findings of the district court that the statute had a legitimate purpose – awarding benefits to veterans – and was not a pretext for discriminating against women. He then offered a critical observation, one that proved to be a powerful and enduring feature of Equal Protection Clause jurisprudence:

> It would [be] disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.
>
> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least

[54] *Id.* at 265-66.

[55] 442 U.S. 256 (1979).

> in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.[56]

After grappling with the explicit remedial use of race by courts, legislative bodies, and various federal and state institutions, the Court turned to redistricting plans drawn to enhance the opportunity of minorities protected by the Voting Rights Act where race had become more than another of many necessary considerations in line-drawing. Justice Ginsberg put it succinctly in *Miller v. Johnson*:

> Two Terms ago, in *Shaw v. Reno*, this Court took up a claim "analytically distinct" from a vote dilution claim. *Shaw* authorized judicial intervention in "extremely irregular" apportionments, in which the legislature cast aside traditional districting practices to consider race alone – in the *Shaw* case, to create a district in North Carolina in which African-Americans would compose a majority of the voters.[57]

In short, *Miller* instructs that we are to engage in a searching review of district lines "predominantly motivated" by race when a state subordinates traditional districting practices to race.

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[56] *Id.* at 278-79 (internal citations omitted); Justice Stewart went on to explain that the impact was relevant as in *Arlington Heights*. *Id.* at 279 n.24 ("Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights v. Metropolitan Housing Dev. Corp.* The inquiry is practical. What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, 'the give and take of the situation.'" (citations omitted)).

[57] *Miller v. Johnson*, 515 U.S. 930, 934 (1995) (Ginsburg, J., dissenting) (internal citations omitted).

Plaintiffs have not proven their claim of racial discrimination. There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage. With the Republican sweep of statewide offices in 2000 came control of the Legislative Redistricting Board. The Legislature was initially unable to redraw district lines for either state legislative or congressional seats. The federal courts drew a congressional district plan[58] and after one modification held that the plans for the Texas House of Representatives and Senate drawn by the Republican-controlled Board were legal.[59] Although the judicial plan for the congressional districts reflected the growing strength of the Republican Party in Texas, with 20 of the 32 seats offering a Republican advantage, the voters in 2002 split their tickets and elected only 15 Republicans. Six incumbent Anglo Democrats were elected by narrow margins in Republican-leaning districts. With Republicans in control of the State Legislature, they set out to increase their representation in the congressional delegation to 22. As we will explain, all that happened thereafter flowed from this objective, with the give-and-take inherent in the legislative process along the way. The result disadvantaged

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[58] *See Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 14, 2002), *aff'd mem.*, 536 U.S. 919 (2002).

[59] *See Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 28, 2001), *available at* 2001 WL 34104833; *Balderas v. Texas*, No. 6:01-CV-158, slip op. (E.D. Tex. Nov. 28, 2001), *available at* 2001 WL 34104836.

Democrats. And a high percentage of Blacks and Latinos are Democrats.[60]

The majority of Plaintiffs' Equal Protection claims focus on District 26 in Plan 1374C, which reflects Republican refusal to preserve Democratic Congressman Martin Frost's District 24 while at the same time preserving adjoining Republican districts. To remove Congressman Frost, he needed to lose a large portion of his Democratic constituency, many of whom lived in a predominantly Black area of Tarrant County. This group of voters was taken from previous District 24 and grouped with Denton and Cooke Counties, which are north of Tarrant County. Plaintiffs view the protrusion that reaches down to include the Black Democrats as evidence of intentional racial discrimination.

We disagree. That African-Americans in Texas vote overwhelmingly for Democratic candidates and that various political compromises were reached to arrive at the current district lines belie the assertion that Texas intentionally discriminated against the African-American voters. Bob Davis, who assisted the Texas Senate in drawing various plans and submitting them to the Legislative Redistricting Board, credibly testified as to the various political considerations that combined to result in the lines of current Congressional District 26. First, Representative Kent Grusendorf, who served on the House side of the districting committee, wanted his State House District – which covers the city of Arlington – to remain

[60] *See, e.g.*, Tr. 12/11 PM (Lichtman), at 67-68; Jackson Pls.' Exs. 1, 10, 12-13, and 15.

whole.[61] Arlington's western boundary forms most of the eastern edge of District 26's southern protrusion. Second, the court-drawn map, Plan 1151C, split State House Representative Glenn Lewis's District 95 into two different congressional districts. Representative Lewis wanted his district to fall completely within one congressional district.[62] House District 95 now forms the southern tip of Plan 1374C's District 26, explaining the southernmost boundaries of District 26. Third, Democrats could not be placed in Congressional District 12 to the west because District 12 would then become "far more Democrat and very marginally Republican, if Republican at all."[63] Finally, Representative Phil King, the chairman of the redistricting bill in the Texas House, wanted Parker and Wise Counties to be included completely in Congresswoman

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[61] Tr. 12/18 AM (Davis), at 77. State Representative Phil King, the bill sponsor for redistricting on the House side, added: "my job was to get eight votes aye on the redistricting committee then 76 on the Floor and then six in the conference committee. And Kent Grusendorf had said that he – that he would not support any plan – he was on the redistricting committee – that did not keep the City of Arlington whole. He said Arlington always gets split up. He wanted it whole." Tr. 12/18 PM (King), at 135-36.

[62] Tr. 12/18 AM (Davis), at 78. Representative King reinforced Davis's testimony, stating: "I had also been directed by the Speaker of the House – Glenn Lewis, was the first Democrat and the first minority member to come out supporting him publicly for Speaker. And Glenn Lewis had asked the Speaker that his District not be divided up, but remain intact within a Congressional District, nonspecific as to which District, although he made it clear his preference was that it stay in a Martin Frost District. So I was directed by the Speaker of the House to under no circumstances split up Glenn Lewis's House seat, which is 95." Tr. 12/18 PM (King), at 136.

[63] Tr. 12/18 AM (Davis), at 79.

Granger's District 12.[64] But if the Tarrant County population fell in District 12, population would need to be taken out, likely from Parker or Wise counties.

> So, the net result was the political consequences of putting that territory, either in District 12 or District 6, were not good. And District 26, which was, in the Court Plan, this area in here, adjacent to it, and so it was placed on the District 26 because the political structure of 26 could handle that particular component of the Tarrant County population and still produce Republican results for District 26.[65]

We find these unchallenged explanations to be credible, and we find that including the large Democratic area of southeast Tarrant County in District 26 was the sole product of political give-and-take by legislative members over their own state districts and the effort to not create another Democratic district. The actions were not taken because of race; they were taken in spite of it.

Plaintiffs' expert's testimony supports our conclusion that politics, not race, drove Plan 1374C. The Jackson Plaintiffs' expert, Dr. John Alford, professor of political

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[64] *Id.* at 79: 19-24.

[65] *Id.* at 80: 2-9. Representative King testified to the same political result: "[W]hat we did in Tarrant County, the only way we could do that is basically took Stop Six Poly and Handley and Meadowbrook area and all of that and moved it up into north and tied it in with the Denton County area. And those – we tried to, the best we could, maintain the city limit lines for Ft. Worth and for Arlington in that measure. And generally, you had that level of politics going on in every county, particularly the metropolitan ones throughout the State." Tr. 12/18 PM (King), at 137.

science at Rice University, testified that "one would have a very hard time not recognizing that the State has a very strong partisan motivation in this particular map."[66] Representative Phil King testified that the purpose of the plan was to make the congressional delegation more reflective of state voting trends. The amicus brief of the Texas House Democratic Caucus and Representatives John Lewis, Chris Bell, Martin Frost, Sheila Jackson Lee, and Nick Lampson filed in *Vieth v. Jubelirer* in support of Appellants told the Supreme Court that "[t]he newly dominant Republicans . . . decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents." It was clear from the evidence that this assertion is true. Former Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was "the entire motivation."[67] He explained that he is leaving the Senate before the expiration of his term in large part out of disappointment at its partisan turn. In the course of the redistricting bill's passage, Senator Ratliff, a Republican, refused to abandon the two-thirds rule, which does not allow a bill to come to the floor without the support of 21 members, a practice calculated to promote consensus building.

Plaintiffs nonetheless insist that there was racial discrimination along the way in the specific drawing of the

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[66] Tr. 12/15 AM (Alford), at 109.

[67] Tr. 12/15 AM (Ratliff), at 35.

lines. We will examine this less sweeping assertion as we examine the particular districts that are alleged to have been drawn in violation of § 2 of the Voting Rights Act, or in defiance of the principles of *Shaw v. Reno*.

While keenly aware of the long history of discrimination against Latinos and Blacks in Texas, and recognizing that their long struggle for economic and personal freedom is not over, we are compelled to conclude that this plan was a political product from start to finish. The myriad decisions made during its creation were made in spite of, and not because of, its effects upon Blacks and Latinos. To find otherwise would frustrate the fundamentals of *Washington v. Davis* and inject the federal courts into a political game for which they are ill-suited, and indeed in which they are charged not to participate under the most basic principles of federalism and separation of power. Concluding that the purpose requirement of the Equal Protection Clause was met on these facts would pass redistricting from the state legislatures and redistricting boards to the federal courts. This is not to say that we wholly withdraw, of course. We simply recognize the fundamental decision in *Washington v. Davis* that federal judges are not legislative players; we are only the guardians of the boundaries. As Justice Ginsburg put it, while "[l]egislative districting is highly political business . . . [g]enerations of rank discrimination against [minorities] account for [the court's] surveillance."[68]

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[68] *Miller v. Johnson*, 515 U.S. 930, 934 (1995) (Ginsburg, J., dissenting).

Having been watchful, we are not persuaded that this most fundamental boundary of the Equal Protection Clause was crossed. In the redistricting arena, an area that has proven most reluctant to yield discernible standards, there are large incentives to reach for the seeming certainty of the Equal Protection Clause's familiar condemnation of purposeful racial discrimination and draw upon its comforting moral force, rather than confront the task of developing proper standards or concede their ephemeral political character. To our eyes, the certainty is an illusion, and its deployment to heel radical partisan line-drawing by state legislatures is a mistake. And turning to *Washington v. Davis*'s insistence of purpose, rather than confronting directly the questions now before the Court in *Vieth v. Jubelirer,* is just an old Texas two-step.[69]

B

We have no hesitation in concluding that, under current law, this court cannot strike down Plan 1374C on

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[69] The Appellants in *Vieth v. Jubelirer* note the problems resulting from litigants turning to race-based claims when they have no chance of proving a *Bandemer* claim: "[W]ith no prospect of prevailing on a forthright claim of partisan gerrymandering under the lower courts' interpretation of *Bandemer*, aggrieved partisans instead often allege racial gerrymandering or minority vote dilution in violation of the Voting Rights Act. The incentive to couch partisan disputes in racial terms bleeds back into the legislative process, too, as members of the 'out' party – believing they can win only in court, and only on a race-based claim – may be tempted to spice the legislative record with all manner of racialized arguments, to lay the foundation for an eventual court challenge." Brief for Appellant at 10-11, *Vieth v. Jubelirer,* 2003 WL 22070244 (2003) (internal citations and footnotes omitted).

the basis that it is an illegal partisan gerrymander. Seventeen years ago, the Supreme Court held in *Davis v. Bandemer*[70] that an excessively political or partisan gerrymander presents a justiciable issue under the Equal Protection Clause. But the Court was unable to settle upon a manageable standard for addressing such claims. It is now painfully clear that Justice Powell's concern that the decision offered a "'constitutional green light' to would-be gerrymanderers" has been realized.[71] *Bandemer* insisted upon proof of both discriminatory purpose and discriminatory effect, two requirements that are difficult to meet in the courtroom, particularly as they have been interpreted by the lower courts. That the response to this difficulty must be to develop a new standard does not necessarily follow. The question remains how much of a role the judiciary ought to play in policing the political give-and-take of redistricting. It may be the most difficult question, but it is certainly the most important.

When the Supreme Court resolves *Vieth*, it may choose to retreat from its decision that the question is justiciable, or it may offer more guidance on the nature of the required effect. Perhaps the Court will draw on its experience in developing federal common law in the antitrust arena, which draws a fine line between competitive effect and injury to competition.[72] We have learned firsthand what will result if the Court chooses to do

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[70] 478 U.S. 109 (1986).

[71] *Id.* at 173 (Powell, J., concurring in part and dissenting in part).

[72] Professor Samuel Issacharoff has explored this idea in a recent article. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

neither. Throughout this case we have borne witness to the powerful, conflicting forces nurtured by *Bandemer*'s holding that the judiciary is to address "excessive" partisan line-drawing, while leaving the issue virtually unenforceable. Inevitably, as the political party in power uses district lines to lock in its present advantage, the party out of power attempts to stretch the protective cover of the Voting Rights Act, urging dilution of critical standards that may, if accepted, aid their party in the short-run but work to the detriment of persons now protected by the Act in the long-run. Casting the appearance both that there is a wrong and that the judiciary stands ready with a remedy, *Bandemer* as applied steps on legislative incentives for self-correction.

There are ameliorations available short of a grand judicial pronouncement, remedies which are perhaps superior. In Texas, redistricting advantages can be overcome through the political process. The exchange of political advantage between the Democrats in 1990 and the Republicans in 2000 demonstrates this reality. If the Democratic party takes the main statewide offices, Democrats can block a state legislative redistricting plan and write their own through the Legislative Redistricting Board. The resulting State Legislature could then redraw the congressional lines.

Even if the partisan gerrymander issue were not justiciable but Congress allowed the drawing of new lines only when there was no extant legal plan, and in any event no more often than once in a decade, the picture would likely be quite different. That the limitation would only reach congressional seats and not state legislatures themselves does not mean that its effects would not be larger. As the record in this case makes clear, Congress

often plays a large role in state redistricting, not only of congressional districts but also of the state chambers themselves. Members of Congress work to protect their incumbency and to affect the partisan makeup of the House, with keen interest in the election of members of the State Legislature. Accordingly, a rule that the game is played only once per decade could matter a great deal in the real world of politics. It is fair to ask what if Congress had imposed a once-a-decade rule seventeen years ago, even if *Bandemer* had dismissed the case as presenting a non-justiciable political question.

Our point is that if the judiciary must rein in partisan gerrymanders, limitations that focus upon the time and circumstance of partisan line-drawing and less upon the "some but not too much" genre of strictures offer the best of an ugly array of choices. Drawing upon the Voting Rights Act jurisprudence to give *Bandemer* teeth may be the worst of choices.

IV

For convenience, we record some of the general principles to which we will refer in addressing Plaintiffs' challenges to specific districts. Section 2 of the Voting Rights Act of 1965 (as amended) provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set fort in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[73]

To prevail on a claim of vote dilution under § 2, a plaintiff must, as a threshold requirement, satisfy the three now-familiar preconditions set forth in *Thornburg v. Gingles*: (1) a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the group must be "politically cohesive"; and (3) sufficient racial bloc voting must exist such that the white majority usually defeats the minority's preferred candidate.[74] *Gingles* withheld deciding whether

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[73] 42 U.S.C. § 1973.

[74] *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). To aid courts in investigating a plaintiff's § 2 claim, the *Gingles* Court identified other factors that may, in "the totality of the circumstances," support a claim of racial vote dilution. Derived from the Senate Report accompanying the 1982 amendment to § 2, those factors include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of

(Continued on following page)

there could ever be a showing of potential success without a showing that a clear majority could gather in the absence of the accused practice or structure. The lower courts, with the exception of a recent decision by a divided

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the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that may be probative of vote dilution in some cases are:

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 37 (quoting S.Rep. No. 97-417, 97th Cong., 2nd Sess., at 28-29 (1982), reprinted in U.S. Code Cong. & Admin. News 1982, at 206-07).

panel of the First Circuit,[75] have strictly enforced the 50% rule, including the Fifth Circuit.[76] There are powerful reasons to be exacting, as we will explain, but the facts of this case offer no occasion to decide if there is a tolerable deviation from the rule that a minority must demonstrate that, absent an accused practice or structure, it had the potential to elect a candidate of its choice by proof that it could constitute 50% of the district.

Although satisfying the *Gingles* factors is a prerequisite, meeting the three conditions is alone not enough to prevail under § 2. If they are met, the court is to consider the totality of the circumstances, including a searching inquiry into whether the political process is equally open to minority voters. In *Johnson v. De Grandy*, the Court explained how to evaluate dilution under a single-member districting plan and discussed the extent of a state's duty to create additional majority-minority districts under § 2.[77] In *De Grandy*, the plaintiffs attempted to establish liability by pointing to a number of places where minority voters had been "cracked" and placed in majority-white districts where their votes would be "submerged" and ineffective. The Court rejected the dilution claim of the

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[75] *See Metts v. Murphy*, 347 F.3d 346 (1st Cir. 2003). We note, however, that the First Circuit elected to take *Metts* en banc and issued an order expressly withdrawing and vacating the panel decision. *See Metts v. Murphy*, No. 02-2204 (1st Cir. Dec. 3, 2003) (order granting petition for rehearing en banc).

[76] *See, e.g., Valdespino v. Alamo Heights Ind. School Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Cousin v. Sundquist*, 145 F.3d 818, 827-29 (6th Cir. 1998); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 (D.S.C. 2002).

[77] 512 U.S. 997 (1994).

Hispanic and African-American voters because the challenged districting plan provided both sets of voters "rough proportionality," the opportunity to exercise electoral control in a number of districts that roughly corresponded to their share of the relevant population.[78] The Court emphasized that proportionality does not provide a complete or mechanical defense to a § 2 suit.[79] The Court also made it clear that proportionality is significant in evaluating dilution claims and has become a preeminent measure of fairness in redistricting.[80] Now known as "*De Grandy* proportionality," dilution may be found to be absent under the totality of the circumstances when the protected minority groups "constitute effective voting majorities in a number of districts . . . substantially proportional to their share in the population."[81]

In *Shaw v. Reno* ("Shaw I"), the Court addressed the constitutionality of a district drawn with race as the predominant motivation, as evidenced by a bizarrely-shaped

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[78] *Id.* at 1015-16.

[79] *Id.* at 1018-19, 1023-24; *see also, Barnett v. City of Chicago*, 141 F.3d 699, 705 (7th Cir. 1998); J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431 (2000) ("As a practical matter, . . . one factor is particularly important: the 'proportionality,' or lack thereof, between the number of minority-controlled districts and the minority's share of the state's relevant population.").

[80] A redistricting plan may, of course, achieve proportionality and yet violate § 2. *See, e.g., Rural West Tennessee African-American Affairs Council v. Sundquist*, 209 F.3d 835 (6th Cir. 2000); *Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038 (8th Cir. 1997); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382 (8th Cir. 1995); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist., #1*, 56 F.3d 904 (8th Cir. 1995); *Barnett v. Daley*, 32 F.3d 1196 (7th Cir. 1994).

[81] *De Grandy*, 512 U.S. at 1020.

district drawn to augment minority voting strength.[82] The Court held that such a district could be challenged, depending on how it was drawn, under the Equal Protection Clause. In *Shaw v. Hunt* ("Shaw II"), the Court concluded that a racially gerrymandered district would be subject to strict scrutiny, and that compliance with § 2 could justify a racially gerrymandered district only if the remedial district was narrowly tailored toward that end.[83] In so holding, the Court held that a remedy for vote dilution in one part of the state, where it was possible to draw an additional, compact majority-minority district, is not narrowly tailored to comply with § 2 if the remedial district is drawn in a different part of the state where polarized voting also exists, but where a compact district cannot be crafted. In so holding, the Court stated:

> Arguing, as appellees do and the District Court did, that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.[84]

Similarly, in *De Grandy*, the Court stated that one reason for rejecting the inflexible safe harbor rule the state advocated in that case, under which no dilution can occur as a matter of law if the percentage of single member

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[82] 509 U.S. 630 (1993).

[83] 517 U.S. 899 (1996).

[84] *Id.* at 917.

districts in which minority voters form an effective majority mirrors the minority voters' percentage of the relevant population, was that it rested on

> an unexplored premise of highly suspect validity: that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class. Under the State's view, the most blatant racial gerrymandering in half of a county's single-member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality was the bottom line.[85]

With these basic principles in mind, we now turn to Plaintiffs' specific claims.

V

We first examine the § 2 challenges to the districts in Central and East Texas, most notably District 24 in the Dallas-Fort Worth area. As a preliminary matter, it bears emphasis that the majority requirement of the first *Gingles* precondition cannot be met in these districts by summing Black and Hispanic voter populations.[86] Plaintiffs cite *Brewer v. Ham*[87] for the proposition that minority groups may be combined to satisfy *Gingles*'s majority

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[85] *De Grandy*, 512 U.S. at 1019.

[86] *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

[87] 876 F.2d 448, 453 (5th Cir. 1989).

requirement. *Brewer*, however, allowed for minority combination when the groups vote cohesively. Here, there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation.[88] Minority voters must have the potential to elect in the absence of the accused practice or structure if their claim of injury by that practice or structure is to be sustained.[89]

A

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Georgia v. Ashcroft[90] is the most recent discussion of the factual and legal distinctions between majority-minority, coalition, and influence districts.[91] Majority-minority or "safe" districts are voting districts with a majority of minority voters, making it "highly likely that minority voters will be able to elect the candidate of their choice."[92] Coalition districts are voting districts where minority voters "'are able to form coalitions with voters from other racial and ethnic groups, having no need to be

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[88] *See* Post-Trial Brief of Jackson Plaintiffs, at 39 (conceding that "African-American and Hispanics in the Metroplex are not consistently 'jointly' cohesive in Democratic primaries"). Furthermore, even assuming that Blacks and Hispanics vote cohesively, Plaintiffs have failed to meet their burden to disprove partisanship as the driving force behind the bloc voting. *See LULAC v. Clements*, 999 F.2d 831, 850 (1993) (en banc).

[89] *Gingles*, 478 U.S. at 51 n.17.

[90] 123 S.Ct. 2498 (2003).

[91] The parties assign various names to these districts, but we will follow the Supreme Court's taxonomy.

[92] *Ashcroft*, 123 S.Ct. at 2511.

a majority within a single district in order to elect candidates of their choice.'"[93] Influence districts are voting districts "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[94] The elected representatives in influence districts, as a result of the influence of minority voting, take minority interests into account.[95]

Georgia tested the limits of these types of districts when it redrew its state senate's voting districts following the 2000 census. The previous map, which was finally precleared after much litigation, included various safe districts. Shifting its strategy, the Democratic-controlled Legislature "unpacked" three of the safe districts and spread the minority voters to create influence and coalition districts.[96] The goal was to increase the overall influence of minorities in Georgia politics. The Justice Department challenged the plan as retrogressive because of the reduction of minorities in the previously safe districts. The district court found the plan retrogressive because the change in the three safe districts created less opportunity for minorities to elect the representatives of their choice.

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[93] *Id.* at 2512 (quoting *De Grandy*, 512 U.S. at 1020).

[94] *Id.*

[95] *Id.*

[96] *Id.* at 2507-08. The districts reduced the minority populations from 60.58%, 55.43%, and 62.45% to 50.31%, 50.66%, and 50.80%, respectively.

Georgia appealed the decision to the Supreme Court, arguing that preclearance was appropriate because the new map did not harm the minorities' "effective exercise of the electoral franchise." Georgia asked the Court to examine the voting plan as a whole so that the increase in voting strength in other influence and coalition districts could offset the decrease in the three previously safe districts. The Justice Department argued that the district court correctly found retrogression based solely on the decrease in minority population in the three previously safe districts.

Georgia's argument prevailed. The Court held that states are free to choose the best way to avoid retrogression and ensure equal opportunity to minority voters. To determine whether a new map is retrogressive, the Court examined the state as a whole and considered all the relevant circumstances, "such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan."[97] The Court accepted that minority interests may be better served by coalition and influence districts rather than safe districts. The Court noted that although safe districts ensure descriptive representation, they also "isolat[e] minority voters from the rest of the state, and risk[] narrowing political influence to only a fraction of political districts"[98] – that "various studies have suggested that the most effective way to maximize minority voting

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[97] *Id.* at 2511.

[98] *Id.* at 2512.

strength may be to create more influence or coalitional districts,"[99] and, critically, Georgia may make that choice. Georgia's alteration of its safe districts would have been problematic at best in the 1980s and early 1990s, but the Court allowed it as a valid political choice that Georgia might choose to make in an effort to increase minority voting strength – an alternative to its obligation under *Gingles* to draw a safe majority-minority district.

The Court held that the district court erred in focusing too heavily on the decrease of voting power in the previously safe districts, and in ignoring the offsetting influence and coalition districts. In the Court's view, the ability of minorities to elect their preferred candidates is important, but not dispositive. Despite the views of the Justice Department, the ACLU, and lower federal courts, the Court held that creating safe districts was not the only means of assuring an effective vote for minorities.

While *Ashcroft* is a § 5 preclearance case addressing the question of retrogression, the Court's opinion makes plain that safe districts are no longer untouchable. States previously read *Gingles* as requiring safe districts to ensure the election of minorities by countering racially polarized voting. But *Georgia v. Ashcroft* makes clear that safe districts are not necessarily required; states may choose to avoid retrogression by creating coalition and influence districts. Georgia decreased the percentage of minority voters in three previously safe districts to such a degree that, in the opinion of the Justice Department, minorities could not elect their candidate of choices. Yet,

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[99] *Id.* at 2513.

the addition of coalition and influence districts countered possible retrogression.

2

All parties here rely upon *Georgia v. Ashcroft*. Plaintiffs argue that *Ashcroft* effectively overruled *Gingles*'s first requirement that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[100] Plaintiffs base this assertion on *Ashcroft*'s reasoning that a district may provide effective representation to minorities despite the absence of a mathematical majority.[101] From this, Plaintiffs conclude that influence districts must be protected under § 2 of the Voting Rights Act.

In response, Texas argues that under *Ashcroft* redrawing an influence district does not inevitably dilute minority votes under § 2. Texas argues that if majority-minority districts may be altered without running afoul of the Voting Rights Act, then *a fortiori* an influence district may be altered. *Ashcroft* provided states with the flexibility to choose the means of complying with the Voting Rights Act, and although the Court opined that coalition and influence districts may be the most effective means of increasing minority influence, they are not required. *Ashcroft* did not dictate that a state must maximize both majority-minority and influence districts. Indeed, the question whether federal law requires influence districts has been avoided many

[100] *Gingles*, 478 U.S. at 50.

[101] *See* Post-Trial Brief of Jackson Plaintiffs, at 5 n.3.

times,[102] reflecting, the State argues, the Court's wariness of being drawn further into the political arena. Finally, the State notes that the Supreme Court faced the exact question and rejected it when it summarily affirmed a district court's rejection of the contention "that the first *Gingles* precondition is not fully applicable" to districts "where a distinct [minority] group cannot form a majority, but they are sufficiently large and cohesive to effectively influence elections, getting their candidate of choice elected."[103]

Texas's argument finds support in the language of *Ashcroft*:

> On one hand, a smaller number of safe majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. . . . And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the representation may be limited to fewer areas.
>
> On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who

[102] *See Uno v. City of Holyoke*, 72 F.3d 973, 979 n.2 (1st Cir. 1995); *Rural West Tenn. African-Am. Affairs Council, Inc. v. McWherter*, 877 F.Supp. 1096, 1101 (W.D. Tenn. 1995).

[103] *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104 (S.D. Ohio) (three-judge panel), *aff'd*, 124 S. Ct. 574 (2003).

> together will help to achieve the electoral aspirations of the minority group. It also, however, creates the risk that the minority group's preferred candidate may lose. . . . Section 5 gives States the flexibility to choose one theory of effective representation over the other.[104]

As we see it, these choices are for the states to make, as long as they avoid other constitutional and statutory violations under the Equal Protection Clause and § 2. Allowing influence districts to meet a *Gingles*-imposed obligation to create a majority-minority district does not mean that a state must create an influence district in the absence of an obligation to create a majority-minority district. We are not persuaded that Texas had the duty in drawing a new map to trace the old lines to avoid any disruption of coalitions. To so conclude would have profound consequences, freezing ephemeral political alliances, which are the bull's eyes of partisan redistricting. We will turn to a concrete example. The 24th is a Democratic district, and its "coalitions" are simply minority Blacks joining with majority Anglos voting a Democratic ticket in the general election. Plaintiffs' understandable efforts to freeze this "coalition" by locating some duty under § 2 not to redraw the district is a transparent effort to use race as a shield from a partisan gerrymander when the district itself was a child of identical efforts to gerrymander. As we will explain, under the new plan, Democrats – both Anglo and Black – lose control of the District 24.

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[104] *Ashcroft*, 123 S.Ct. at 2512 (internal citations omitted).

B

We turn first to District 24, located in the Dallas-Fort Worth metroplex in an area referred to as the mid-cities. The congressman from the district is Martin Frost, an Anglo Democrat elected in 1978. This area between Dallas and Fort Worth experienced enormous growth from the early 1960's, leading to the creation of the 24th in 1972. With some iteration, the district has remained in place until the passage of Plan 1374C in 2003. The old 24th touched both Dallas and Fort Worth and included the communities of Duncanville and Cedar Hill on its south side. It also included large plants of Bell Helicopter, General Motors, Northrop Grumman, and Lockheed Martin, as well as the Texas Rangers' baseball stadium and the Six Flags Over Texas theme park.[105]

Frost, then thirty-two years old, ran for the seat two years after it was created but was defeated in the Democratic primary by Dale Milford, the Anglo incumbent. Congressman Frost won the next race and has held the seat since then. Allied with Speaker Wright of Fort Worth, he quickly won leadership positions, including a seat on the Rules Committee. Frost is a major fund raiser for the Democratic party, and he so effectively chaired a redistricting panel in 1991 that he is widely seen as the architect of the redistricting plan of 1991.[106] This plan, drawing on the developing computer technology, is cited by political

[105] MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1580 (Nat'l Journal Group 2003).

[106] *Id.* at 1581.

scientists as the shrewdest of the 1990s.[107] Congresswoman Eddie Bernice Johnson, who holds a seat in an adjacent largely Black district, testified that Frost drew the 24th for ~~an Anglo~~ Democrat.[108]

The judicial plan replaced by 1374C left the 24th largely in place. It had a Black voting age population of 21.4% and a Hispanic voting age population of 33.6%. The latter number falls when citizenship (CVAP) is considered, as it must be. The result is that neither Blacks nor Hispanics have 50% of the voters in the district alone or combined, where they constitute only 46.4%. Measured by the statewide races and the Lieutenant Governor's race in 2002, District 24 is approximately 60% Democrat, although Al Gore carried the district with 54% of the vote and Governor Bush carried the entire state with 59% of the statewide vote and 61% in the Dallas-Fort Worth metroplex. It bears mention that Houston and Dallas-Fort Worth cast 47% of all votes cast in the state.[109] Bush carried only 5% of the Black vote but enjoyed 42% of the Hispanic vote and 73% of the Anglo vote.[110]

Facing the absence of a minority with 50% of the voting age population of the district singly or combined, Plaintiffs contend that the 24th nonetheless meets the first two preconditions of *Gingles* because it "functions as a

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[107] *Id.* at 1448 ("The plan carefully constructs democratic districts with incredibly convoluted lines and packs heavily Republican suburban areas into just a few districts.").

[108] Tr. 12/17 PM (Johnson), at 154-155, 161, 164-165.

[109] BARONE, supra note 105, at 1508.

[110] *Id.* at 1510.

fully effective Black opportunity district." They offer three reasons why we should not adhere to *Perez v. Pasadena Independent School District*[111] and *Valdespino v. Alamo Heights Independent School District*,[112] which hold that *Gingles* requires a cohesive group of minority voters comprising a majority of the adult citizen population in at least one proposed single-member demonstration district. First, insisting on a level of 50% is reasonable only when the court is asked to speculate on the potential performance of a minority district, not when an existing district is shown to actually perform for minorities. Second, Plaintiffs point to a divided decision issued only weeks ago by a panel of the First Circuit, *Metts v. Murphy*, which dispensed with the 50% rule. The panel's decision, we note, was expressly withdrawn and vacated when the First Circuit voted to take the case en banc.[113] Third, *Perez* and *Valdespino* involved challenges to non-partisan at-large election systems involving only single elections; here, we examine a single-member districting system with primary and general elections. Plaintiffs assert that if a minority can "control" the primary election and then find support with a coalition of minorities in the general election, the *Gingles* requirements are met and the district cannot be modified. Plaintiffs also offer a fourth, seemingly free-standing principle, urging that in any event District 24 cannot be intentionally dismantled because it is an influence or coalition district.

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[111] 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

[112] 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000).

[113] 347 F.3d 346 (1st Cir. 2003), *vacated and reh'g en banc granted*, No. 02-2204 (1st Cir. Dec. 3, 2003).

Defendants respond that § 2 requires a showing of strength at a level of at least 50% is a command of § 2, a requirement that is an inevitable byproduct of the statute's protection of the ability of minorities to elect representatives of their choice. A minority group lacking a majority cannot elect its candidate of choice, and denying the group a separate district cannot be a denial of any opportunity protected by the Act. Rather, such a group can elect their candidate of choice only with the votes of non-majorities through coalitions, but the Voting Rights Act does not protect such political coalitions. Defendants urge that whether a minority can meet the 50% standard is a quite different question from asking "whether a bi-racial coalition of African Americans and 'crossover' Anglos can elect a Black-preferred Black candidate. Any such interpretation would render the first *Gingles* precondition an entirely superfluous subpart of the third *Gingles* precondition." Defendants argue further that the Supreme Court has never held that § 2 protects influence districts and such a proposal is foreclosed by the rationale of *Georgia v. Ashcroft*. Finally, defendants reply that there has been no showing that the 24th would probably elect a Black candidate, pointing to Congressional District 25 in the judicial Plan 1151C in which the demographics are strikingly similar – 21.4% BVAP and 33.6% HVAP – where an Anglo, Bell, defeated Carroll Robinson, the Black candidate of choice, in the 2002 Democratic primary.

Plaintiffs' arguments are creative, but they ask this court to do more than well-settled law will allow. To the heart of the matter: the contention that § 2 protects District 24 from redrawing asks us to extend § 2's protection of Blacks and Latinos from vote dilution to the protection of groups whose cementing force is membership and

loyalty to a political party. *Gingles* and the cases that followed it have been keenly aware that the defining concepts of *Gingles* – numbers and cohesion – are critical to its studied effort to confine the limits of the Act to those situations that dilute minorities' opportunity to vote without protecting coalitions that may be helpful or even essential to the leveraging of their strength.[114] Properly confined, the Act implements the fundamentals of factions. Unconfined it reaches into the political market and supports

[114] Dr. Keith Gaddie credibly testified that Plaintiffs' view of influence districts "would lock in a majority of seats for the party getting the minority of the vote." Deposition of Keith Gaddie, November 22, 2003, at 101. Further, he testified that it was not protected under § 2 and that it was not possible to draw a second, sufficiently compact majority-minority district in Dallas. *Id.* at 75 ("[District 24] is not going to meet the first prong of the *Gingles* criteria. . . . It is not a district in which you have one minority group which can constitute a majority of the population. It's not a district where that minority group controls primary and the general election. It's not possible to draw a second sufficiently compact majority district in Dallas if you draw District 30."). Accordingly, if § 2 protection is afforded to old District 24 despite the absence of the *Gingles* factors, the Voting Rights Act begins to protect political affiliation and not race. If the Voting Rights Act protects a district where coalitions are required to elect a candidate of choice –

> you're on a slippery slope to essentially saying, "Well, if it's a Democratic district, you can't re-draw it." And intellectually, that to me is troubling because it sets up a circumstance where one party has its constituency protected under the Voting Rights Act and . . . the other party doesn't have any protections at all.

Id. at 100. Protecting districts that are defined and controlled by political coalition and not race would infringe on the clear right of the state to choose its method of compliance with the Voting Rights Act. If there is no obligation to create an influence district, there is no obligation to retain one.

persons joined, not by race, but by common view. Serious constitutional questions loom at that juncture.

We are told that Blacks control the Democratic primary with less than 22% of the CVAP because Anglos and Latinos vote either in the Republican primary or not at all, but return home out of party loyalty in the general election. It is argued that this is a Black opportunity district. More accurately, however, it is a strong Democratic district. That there is no cohesion between Black and Latino voters in the primary contests is beyond serious dispute. Black opportunity here lies in coalitions with Anglos who vote with them in the general election for Democrats. Dr. Lichtman's calculations produce an Anglo crossover rate of 30.75 (unweighted mean). He conceded that in the general election Black turnout will fall to the range of 31, 32 or perhaps 33%, while Anglo turnout will jump into the 60's, approximately a two to one margin. Just how far this argument departs from the *Gingles* construct is exposed by the reminder that such a crossover rate has been found to establish the absence of Anglo bloc voting under *Gingles*'s third precondition as a matter of law.[115]

The history of the 24th illustrates that Plaintiffs overstate the impact of the Black Democrats' control of the primaries. The reality is that Frost has not had a primary opponent since his incumbency began. That no Black candidate has ever filed in a Democratic primary against Frost in a district assertedly controlled by Blacks reflects the accuracy of Congresswoman Johnson's claim that

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[115] *See Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

District 24 was drawn for an Anglo Democrat.[116] We have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate. Plaintiffs' asserted control of Blacks in the primary rests upon the shaky ground that much of the dominating Anglo Democratic vote does not bother to vote in the primary with Frost filing as an unchallenged Anglo. Its premise is that Frost challenged by a Black candidate would not result in a return to primary voting by the Anglo Democrats. In short, that Anglo Democrats control this district is the most rational conclusion.

Nor is the cohesiveness of this 21.6% black voting age population clear. Plaintiffs' expert relied heavily upon the high vote in the district for Ron Kirk, an African-American and former popular mayor of Dallas, in his race for the United States Senate. Dr. Lichtman resisted the suggestion that the "friends and neighbors" effect was distorting the results with the counter suggestion that the effect would be offset by Kirk's opponent in the Democratic primary, Victor Morales. That explanation is not persuasive. Morales is actually from Crandall, a town of 3,000 people some 75 miles away. In the 1998 Attorney General race, Judge Morris Overstreet, a widely known, respected, and distinguished lawyer and judge, took 66% of the Black vote in Dallas County and 76% of the Black vote in Tarrant County. Julius Whittier, a Black candidate in the 2002 race for the Texas Court of Criminal Appeals, received 32% of the Anglo vote and 40% of the Black vote. In

[116] *See supra* note 108. District 24 adjoins Johnson's District 30, a *Gingles*-mandated district, meaning it exists because Anglos vote as a block to defeat Black preferences.

short, whether Blacks vote cohesively in the primary is far from certain.

That Blacks wield influence in the district is plain. Perhaps recognizing the difficulty of arguing that some specie of a relaxed *Gingles* construct imposes an obligation to create an influence or coalition district, Plaintiffs offer a fall-back alternative: that as an "influence district," the 24th cannot be "intentionally" redrawn. But this turns the principle of *Georgia v. Ashcroft* on its head. As we have explained, *Ashcroft* gave states greater latitude in complying with the Voting Rights Act. The Court recognized that while *Gingles* in application has resulted in significant gains in elected positions held by minorities, with the keener edge of computer drawn lines, it has also created "safe" white and minority districts, significantly reducing the necessity for the pull and tug to secure support from those with political influence. By locking in safe districts for minorities and Anglos alike – instead of encouraging competition and the pull and tug of politics – this legal regime began to undermine the core idea that the House of Representatives would be the branch of government directly responsive to the people. *Ashcroft* responds to these and other political realities with greater concern for forces that divide and fractionalize, especially those that would divide along racial lines. We do not read *Ashcroft* as fencing even more territory from state legislative reach. Considering that District 24 as a pure influence district is unprotected by § 2, we are persuaded that alterations to it raised questions primarily of § 5, which have been answered by the Department of Justice.

C

Although the bulk of Plaintiffs' argument focuses on District 24, Plaintiffs also assert that Plan 1374C violates § 2 by modifying minority influence districts in Central and East Texas, specifically districts 1, 2, 4, 9, 10, 11, and 17 from Plan 1151C. According to Plaintiffs, the minority population in these districts will have only a minimal role in the electoral process under the new plan.

However, as the State points out, Plaintiffs never argue – and certainly never prove – that any of these districts satisfies the *Gingles* preconditions. Even a cursory glance at the population data reveals that none of these districts passes muster under *Gingles*'s first prong. In none of these districts does the citizen voting age population of any cognizable minority group surpass 22%, and in most the percentage is significantly lower. Indeed, even if we were to follow Plaintiffs' suggestion and combine the Black and Hispanic citizen voting numbers – despite the lack of evidence of cohesion among these groups[117] – the districts would still fail the first *Gingles* precondition by large margins. The evidence convinces us that these districts are influence districts at best, although we note that these districts vary considerably in the opportunity they afford minorities as a group to play any significant role in the electoral process. The population statistics summarized below bring this conclusion into sharper focus.

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[117] The record, we should note, is largely bereft of evidence that Hispanics and Blacks vote cohesively as a group in these districts. We therefore echo our conclusion on District 24 and find that Plaintiffs have failed to prove that the Latino and Black communities in Districts 1, 2, 4, 9, 10, and 11 function as a cohesive voting bloc.

District	Plan 1151C			Plan 1374C		
	Black CVAP	Hispanic CVAP	B&H CVAP	Black CVAP	Hispanic CVAP	B+H CVAP
1	15.8	3.3	19.1	18.2	3.9	22.1
2	14.0	5.2	19.1	19.3	8.2	27.5
4	11.5	4.1	15.6	10.3	3.9	14.2
9	21.3	9.7	31.0	46.8	16.8	63.6
10	11.8	22.0	33.8	9.7	12.1	21.8
11	15.2	11.6	26.8	4.3	21.9	26.2
17	4.0	14.5	18.5	10.0	9.8	19.8

Plaintiffs admit that these seven districts are at most influence districts, but nonetheless urge that the State, after *Ashcroft*, is forbidden from altering them. Plaintiffs, however, do not argue that any of these districts is protected individually; they focus instead on these districts as a group and suggest that the State, by redrawing these seven influence districts plus the coalition districts in Districts 23 and 24, has gone too far in limiting minority influence statewide. We cannot agree. As we explained above, the State was under no § 2 obligation to create these districts, and we find that the State labors under no corresponding compulsion to preserve these districts. The allegation that the minority voting strength in these districts has been diluted is in truth no more than a claim that these districts have been drawn to add Republican voting strength to overcome the election advantage that the current Democrat incumbents hold.

VI

We next examine the challenge brought by and on behalf of Latino plaintiffs and intervenors to the impact of the legislative plan on Latino voting strength in South and West Texas. At the outset, it is useful to understand that the difficulties Texas presents to a redistricter are nowhere greater than in the Southern and western part of the State. The area can be described as a huge and rough inverted triangle, beginning in El Paso at the far western corner, extending south and east for hundreds of sparsely populated miles on or near the border to the cities of Laredo in Webb County, McAllen in Hidalgo County, and Brownsville in Cameron County, turning north up to the coastal city of Corpus Christi in Nueces County, then turning west to cover many miles that are lightly populated except for the areas to the south of San Antonio in Bexar County and Austin in Travis County. The sheer size of the land, its irregular shape, and the distribution of the bulk of the population in various pockets of the State are the basics that shape the map before the redistricter even begins. This part of the State also contains the greatest concentrations of Hispanic population. In the State as a whole, Latinos account for approximately 32% of the total population, 29% of the voting age population, and 22% of the citizen voting age population. In the South and West Texas regions at issue here, Hispanics represent 58% of the citizen voting age population. The largest numbers of Hispanics are located in the same areas of South and West Texas as are the large pockets of Anglo population: in El Paso County in the southwest corner; in Webb County, Hidalgo County, and Cameron County in South Texas along the border and in the Rio Grande Valley; in Nueces County in the east along the coast; and in Central Texas in Bexar County and Travis County.

The plan the *Balderas* court approved to account for the population changes documented in the 2000 census, Plan 1151C, placed six congressional districts in South and West Texas, each containing the 651,620 individuals needed for equal population distribution and the mandate of one-man-one-vote. In Plan 1374C, the Legislature drew seven congressional districts in the same area, each containing the necessary 651,620 individuals. In both plans, six districts have a majority Hispanic citizen voting age population. Of the 44 counties included in the six districts in Plan 1151C and the 58 counties included in the seven districts in Plan 1374C, only the seven counties listed above – El Paso, Webb, Hidalgo, Cameron, Nueces, Travis, and Bexar – have populations above 100,000.

This combination of geography and population distribution fixes certain characteristics of the redistricting map for South and West Texas, reflected in both Plan 1151C and Plan 1374C. Both have a district in the far western corner of the State, in El Paso County, which has a population approaching 680,000. Under both Plan 1151C and Plan 1374C, Congressional District 16 in part of El Paso County has a majority Hispanic citizen voting age population and is an effective "safe" Hispanic opportunity district. Plan 1374C leaves Congressional District 16 essentially unchanged, a decision not challenged in this case. But east of this far western population pocket, the counties are so sparsely populated that the district next to 16 – Congressional District 23 – must extend far to the east to reach the numbers of people

necessary to satisfy equipopulosity.[118] A map drawer must travel east almost 800 miles to reach another county that approaches, much less exceeds, 100,000 souls: Webb County, at the western edge of the southern tip of Texas.

In Plan 1151C, Webb County, with 193,117 people, is kept entirely in Congressional District 23; in Plan 1374C, Webb County is divided between Congressional District 23 and Congressional District 28, directly to the east. Whether Webb County is divided or not, the districts that begin in the relatively narrow and relatively densely populated southern part of Texas, which includes the Rio Grande Valley, must extend north to gather enough population to satisfy equality among the districts. Both Plan 1151C and Plan 1374C share this characteristic. Plan 1151C has two "strip" districts that begin in South Texas and travel to the north toward the center of the State to gather the requisite number of people.[119] Plan 1374C has three "strip" districts that begin in South Texas; each of those districts follows the same north-south path and has

[118] The map reveals that Hudspeth County, next to El Paso County, includes 3,344 people; Culberson County and Jeff Davis County directly to the east contain 2,975 and 2,207 people, respectively. Presidio County to the southeast is the only county between El Paso and Maverick Counties with an excess of 50% or more Hispanic voting age population, and it has only 7,304 people. The vast area between Presidio and Maverick Counties includes Brewster County, with 8,866 people; Terrell County, with 1,081 people; Val Verde County, with 44,856 people; and Kinney County, with 3,379 people.

[119] Many of the counties north of Hidalgo County (569,463) and Cameron County (335,227) in the Rio Grande Valley are thinly populated. They include Jim Hogg County, northwest of Hidalgo County (5,281); McMullen County (851); Kenedy County (414); Live Oak County (12,309); and Goliad County (6,928).

the same shape as in Plan 1151C, but is narrower and longer to accommodate three districts rather than two. In both Plan 1151C and Plan 1374C, the redistricter traveling north largely avoided the area that is Congressional District 20, which includes San Antonio in Bexar County and is a "safe" Hispanic district.

The map drawer defining the district in the southeastern corner of the State must also begin in the Rio Grande Valley and proceed north to include enough people to satisfy equipopulosity. The map drawer need not travel as far north as in the "strip" districts to find the necessary population for this southeastern coastal district, however, because Nueces County, which contains Corpus Christi, has over 300,000 people.

Both Plan 1151C and Plan 1374C exhibit similar features, resulting from this combination of geography and population distribution. The district that begins just east of El Paso County must be large and must run east from far West Texas, stretching deeply into Central and South Texas. The districts that begin in far South Texas must run north in "strip" fashion into Central Texas. The district that begins in the southern tip of Texas and travels up the coast must also proceed north.

Against this backdrop, we examine the record as to the effects of the legislative plan in South and West Texas on Latino voting strength.

A

In Plan 1151C, the court drew six districts in South and West Texas, each with a majority of the Latino citizen voting age population. As noted, two of those districts,

Congressional District 16, consisting primarily of part of the city of El Paso, and Congressional District 20, consisting primarily of part of the city of San Antonio, are not at issue in the change from Plan 1151C to Plan 1374C and are not challenged in this suit. Both were, and are, effective Hispanic opportunity districts. One of the districts in Plan 1151C, Congressional District 23, had a bare majority of Hispanic citizen voting age population and had not performed consistently as a Hispanic opportunity district. Congressional Districts 28, 15, and 27 made up the remainder of the districts in South and West Texas, each with a majority Hispanic citizen voting age population and a majority of the Spanish-surnamed registered voters, and each performing as effective Hispanic opportunity districts. Each of the six districts in South and West Texas under Plan 1151C was reliably Democratic in both congressional and other elections, with the exception of Congressional District 23. That district has since 1992 elected a Hispanic Republican to Congress, Henry Bonilla.

In Plan 1374C, the Legislature sought to apply to South and West Texas its primary partisan goal of increasing the likelihood that Republican candidates would be elected to Congress, while avoiding violations of the Voting Rights Act, the Equal Protection Clause, and the mandate of one-man-one-vote. The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection. The evidence showed that Bonilla had lost a larger amount of Hispanic support in each successive election. In 2002, Bonilla attracted only 8% of the Latino vote. In order to make Congressional District 23 more Republican, the map drawers extended the district north to take in largely

Republican and Anglo areas in the north-central part of the State, including Bandera, Kerr, and Kendall counties. That change added approximately 101,260 people to Congressional District 23. The legislative plan moved the district line at the eastern edge to divide the southern border city of Laredo, in Webb County. That change resulted in 99,776 individuals, who were more than 90% Hispanic in voting age population and 86.5% Democratic in voting according to the 2002 statewide election data, being placed in the adjacent district, Congressional District 28. Although Congressional District 23 still had a majority of Hispanics – 55.1% – and a bare majority of Hispanics of voting age – 50.9% – it no longer had a majority of citizen voting age Hispanics. In the reconfigured Congressional District 23 in Plan 1374C, Hispanics accounted for 46% of the citizens of voting age, and only 44% of the registered voters had Spanish surnames. By contrast, Congressional District 23 in Plan 1151C had a 57.5% Hispanic citizen voting age population and 55.3% Spanish-surnamed registered voters. To avoid retrogression under § 5, the State created another district in South and West Texas, in which Hispanics were a clear majority of the citizen voting age population. The State then had to adjust the population distributions to avoid inequality among the districts.

To accomplish the first goal, Plan 1374C added a third district to the two already long and relatively narrow districts that covered the bottom of the inverted triangle of South Texas and extended north. To maintain the requisite population numbers, each of these three districts had to extend farther north than the two districts had in Plan 1151C. The three districts under Plan 1374C ran from the population pockets near the border north through

sparsely-populated areas to reach the pockets of population in the central part of the State, south and east of San Antonio and Austin. The reconfigured districts each added counties in the process.[120] The two preexisting districts – Congressional Districts 28 and 15 – maintained a majority Hispanic citizen voting age population and a majority of Spanish-surnamed registered voters in Plan 1374C. The newly created District – Congressional District 25 – also had a majority Hispanic citizen voting age population and a majority of Spanish-surnamed registered voters. The district that runs along the eastern border of South Texas, Congressional District 27, similarly maintained a majority Hispanic citizen voting population and a majority of Spanish-surnamed registered voters. As a result, Plan 1374C had seven congressional districts in South and West Texas, six with a majority of Latino citizen voting age population that are, as explained further below, effective Hispanic opportunity districts, and one that is a Hispanic influence district. Plan 1151C had six congressional districts in South and West Texas with a majority of Latino citizen voting age population, one of which was not an effective Hispanic opportunity district, but was moving in that direction.

[120] Congressional District 23 in Plan 1151C was made up of 24 counties; in Plan 1374C, it included 25 counties. Congressional District 28 included 11 counties in both Plan 1151C and Plan 1374C. New Congressional District 25 in Plan 1374C comprised 9 counties. Congressional District 15 in Plan 1151C included 8 counties; in Plan 1374C, Congressional District 15 included 13 counties. Congressional District 27 in Plan 1151C included 5 counties; in Plan 1374C, it included 6 counties.

Plaintiffs raise a number of challenges to the redrawn districts in South and West Texas. The GI Forum Plaintiffs claim that Plan 1374C is deficient for the same reason its predecessor, Plan 1151C, was deficient: an additional Latino majority citizen voting age population district should be drawn to achieve compliance with § 2 of the Voting Rights Act. Plaintiffs claim that the legislative plan dilutes Latino voting strength, in violation of § 2. Finally, Plaintiffs claim that in deciding where to draw the lines, the map drawers were predominately driven by ethnicity, in violation of the Equal Protection Clause. Plaintiffs assert that in drawing the excessively long "bacon-strip" districts, Congressional Districts 15, 25, and 28, the Legislature subordinated the traditional redistricting criteria of compactness and respect for communities of interest and political divisions to the need to include sufficient numbers of Latino voters to create majority-minority districts, in a manner forbidden by *Shaw v. Reno* (*Shaw I*)[121] and its progeny.

The State responds by arguing that there have been no developments since the *Balderas* panel issued its opinion to call into question that court's holding that § 2 did not require an additional Latino majority citizen voting age population district in South and West Texas. The State argues that the Supreme Court's decision in *De Grandy v. Johnson*[122] strongly supports its position because the number of effective Latino majority citizen voting age population districts in the relevant area is more than

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[121] 509 U.S. 630 (1993).

[122] 512 U.S. 997 (1994).

roughly proportional to the Latino citizen voting age population in that area and as proportional to the Latino citizen voting age population in the State as the *Gingles* requirements support. The State argues, and presented evidence to show, that the changes made to the South and West Texas districts in Plan 1374C resulted from the politically motivated decision to make Congressional District 23 more Republican and improve the reelection chances of the Hispanic Republican incumbent, Congressman Henry Bonilla. The State presented evidence that it could not achieve its political end without splitting Laredo and Webb County to remove reliably Democratic voters; that it added a new district, Congressional District 25, which, with Congressional Districts 15, 28, and 27, provides the same number of effective Latino opportunity districts as did Plan 1151C and meets the requirements of *De Grandy* proportionality; and that ethnicity did not predominate in the numerous decisions involved in the placement of the district lines in Congressional Districts 28, 15, 25, and 27.

The claims that Plaintiffs make as to this part of the State do not raise the questions of coalition districts in which Anglos, Hispanics, and African-Americans are all present, although no minority group is a majority of the relevant population. Rather, Plaintiffs make claims that are more familiar in Voting Rights Act litigation. They claim that in South and West Texas, they are a minority meeting the *Gingles* requirements; that in one district, they have been "cracked" and submerged into an Anglo majority, such that they cannot elect candidates of their choice; and that as to the rest of the districts in the area, although they are a majority of the citizen voting age population, a functional examination reveals that their

ability effectively to elect their candidates of choice has been weakened. The fact that the dilution claim is familiar, however, does not make the analysis simple. As the Supreme Court stated in *De Grandy,* "Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some. When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls." [123]

B

The GI Forum Plaintiffs allege that they are entitled under § 2 to an additional district in South and West Texas in which Latinos are a majority of the citizen voting age population and can effectively elect candidates of their choice. In both Plan 1151C and Plan 1374C, six districts in South and West Texas have a majority of Latino citizens of voting age. The GI Forum Plaintiffs present a demonstration district, Plan 1385C, that shows an additional Latino citizen voting age majority district in South and West Texas. The record contains variations of proposed districting plans that meet the same goal. These Plaintiffs, however, have presented no convincing basis to reject the *Balderas* holding that § 2 did not require an additional district in South and West Texas after the 2000 census.

The GI Forum Plaintiffs argue that since *Balderas,* additional data has become available distinguishing the

[123] *Id.* at 1012-13.

citizen voting age population by race and ethnicity, making it easier to establish that an additional *Gingles* district can be drawn in South and West Texas. Plaintiffs presented demonstration plans to the *Balderas* panel that they claimed showed the feasibility of drawing an additional Hispanic citizen voting age population majority district in the area. The *Balderas* panel found that Plaintiffs had failed to prove that § 2 required the creation of an additional Latino citizen voting age majority congressional district in South and West Texas. Plaintiffs appealed that finding; the Supreme Court summarily affirmed. The additional census data Plaintiffs present does not alter the validity of that finding.[124]

[124] There is an obvious difference between the roles of the *Balderas* court and this court. The *Balderas* court had the remedial task of crafting a congressional redistricting plan according to neutral factors because the Legislature had failed to implement a plan following the 2000 census. This court, by contrast, must carefully and thoroughly examine the legislative redistricting plan to determine whether the Legislature used factors and reached results that violate federal law. This court is "barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place. Time and again [the Supreme Court has] emphasized that 'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than [that] of a federal court'" *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (quoting *Growe v. Emison*, 507 U.S. 25, 34 (1993)). "Because the 'States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law,' . . . the federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements." *Id.* The difference in the roles played by the *Balderas* court and this court does not lead to a difference in outcome as to the issue of an additional Hispanic majority citizen voting age population district in South and West Texas.

The GI Forum Plaintiffs assert that they have met the *Gingles* criteria because their demonstration plan, 1385C, creates seven districts with a Hispanic citizen voting age population above 50%. The record, however, does not show that their demonstration plan would satisfy *Gingles*. Plan 1385C proposes districts that are more unusually shaped than in either Plan 1151C or Plan 1374C.[125] The

[125] In the demonstration plan, 1385C, Congressional District 23 is almost bisected by Congressional District 25, which surrounds the intruding district on three sides. Congressional District 25 travels north, then west, with an arm that projects to the northeast into Central Texas. Congressional District 15 goes from the Rio Grande Valley east to the coast north of Nueces County, then cuts north into Central Texas. A comparison of the compactness scores between the two plans understates the unusual shapes of the proposed demonstration district, as compared to both 1151C and 1374C. The "smallest circle" figure is a "dispersion" measure that captures the density of a district by calculating the ratio of the district's area to the area of the minimum circle that could circumscribe it. The "perimeter to area" measure captures the irregularity or jaggedness of a district's border by calculating the ratio of the district's area to the square of its perimeter. At trial, Plaintiffs vigorously criticized the legislative plan for high compactness scores, particularly for Congressional Districts 15 and 25. While those districts have slightly better compactness scores in the demonstration plan, the perimeter to area scores for Congressional Districts 23 and 28, which begins in Bexar County and moves toward Travis County, taking small parts of five different counties, are significantly worse. And Plaintiffs' criticisms of parts of Plan 1374C for extending certain districts across disparate and distant communities would seem even more applicable to parts of demonstration Plan 1385C.

	Perimeter to Area		Smallest Circle	
Congressional District	1374c	1385c	1374c	1385c
15	11.6	8.8	6.5	5.4
16	3.8	4.1	2.9	4.6
20	7.3	5.8	3.0	2.7
23	5.1	9.4	3.8	4.5

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demonstration plan Plaintiffs present underscores the difficulty of drawing seven, rather than six, Latino opportunity districts that meet the *Gingles* requirements in the vast geography and irregularly distributed population of South and West Texas.

Even if this court were to assume that the finding in *Balderas* rejecting the claim that an additional Hispanic citizen voting age population majority district should be drawn in South and West Texas was entitled to no weight, and even if this court were to overlook the *Gingles* problems reflected in the proffered demonstration plan, the GI Forum Plaintiffs have failed to make the necessary showing under § 2. This court recognizes that Plaintiffs have established racially polarized voting and a political, social, and economic legacy of past discrimination. But any examination of the totality of the circumstances beyond *Gingles* must include proportionality. Plaintiffs argue that because Latinos represent 22% of the citizen voting age population of the State, seven out of the thirty-two districts in the State should be drawn to produce Latino citizen voting age majorities. The State responds by noting that Latinos comprise 58% of the citizen voting age population in South and West Texas and constitute the majority of the citizen voting age population in six out of the seven districts in that region, exceeding rough proportionality for

25	9.6	5.9	8.5	2.8
27	5.1	3.4	3.1	3.1
28	5.7	10.0	5.0	6.0

the area.[126] The State also argues that even considering all of Texas as the relevant area for measuring proportionality, an examination of the totality of the circumstances does not lead to the conclusion that an additional Latino majority citizen voting age population district must be drawn in South and West Texas.

The Supreme Court has explained that "proportionality," a word not expressly used in § 2, involves a comparison between (1) the percentage share of legislative districts in which the population of the protected class has a majority and (2) the protected class's percentage share of the "relevant population."[127] Proportionality is an important aspect

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[126] The State provides an analysis, as follows:

1374C Districts	Total CVAP	Percent Hispanic
15	379,368	58.5%
16	359,793	69.9%
20	419,668	60.8%
23	407,130	45.8%
25	358,683	55.0%
27	398,328	60.4%
28	404,341	56.2%
TOTAL	2,727,311	57.94%

(State's Post-Trial Br. at 62).

[127] *De Grandy*, 512 U.S. at 1014 n. 11. "Proportionality" in this sense is only one factor to be considered in assessing the totality of circumstances to determine if unlawful vote dilution has created an "unequal political and electoral opportunity" for a protected class. *Id.* at 1022. Just as the Supreme Court in *De Grandy* made clear that "proportionality" of opportunity cannot be a "safe harbor" precluding § 2 liability, which turns on total circumstances, *id.* at 1017-22 so, too, a showing of lack of proportionality is but one factor in the total circumstances analysis. The Supreme Court has made clear that "the degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a shortcut to determine whether

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in evaluating "equality of opportunity, [but is] not a guarantee of electoral success for minority-preferred candidates."[128]

The Supreme Court has not resolved what geographic frame of reference should be used to analyze proportionality, whether it is by district, county, region, or state. In *DeGrandy*, "the plaintiffs . . . passed up the opportunity to frame their dilution claim in statewide terms"; the Court applied the *Gingles* factors and analyzed proportionality as limited to "Hispanics in the Dade County area."[129] In this case, however, Plaintiffs do not argue that the *Gingles* criteria justify the creation of any additional Latino citizen voting age majority districts outside South and West Texas. Despite the presence of large numbers of Hispanics elsewhere in the State, and despite the presence of racially polarized voting throughout the State, no plaintiff asserts that the *Gingles* criteria would permit an additional Latino citizen voting age population majority district anywhere but in South and West Texas. Again, the combination of geography and population distribution quickly explain why. The areas in which Latinos account for 50% or more of the voting age population are confined to El Paso County in far West Texas, surrounded by counties of vast space and little population; Presidio County in West Texas along the border, which has only 7,304 people and is surrounded by vast space with little population; and the South Texas area from Maverick County to the Rio Grande Valley. The Latino population in the rest of the State is numerous, but

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a set of single-member districts unlawfully dilutes minority voting strength." *Id.* at 1020-21.

[128] *Id.* at 1014 n. 11.

[129] *Id.* at 1022.

dispersed over large areas.[130] Lower courts that have analyzed "proportionality" in the *De Grandy* sense have been consistent in using the same frame of reference for that factor and for the factors set forth in *Gingles*.[131] If South and West Texas is the only area in which *Gingles* is applied and can be met, as Plaintiffs argue, it is also the relevant area for measuring proportionality. Because the Supreme Court has not yet provided precise guidance on the proper standard for assessing proportionality, however, we also examine proportionality on a statewide basis.

Under the legislative plan, 1374C, as under the court-imposed plan it replaces, 1151C, six out of the seven districts in South and West Texas are Latino citizen voting age majority districts. Given the fact that Latinos comprise 58% of the citizen voting age population in South and West Texas, proportionality is satisfied as to that area.

As noted, the Supreme Court has not made clear what geographic unit is the relevant area to measure proportionality. *De Grandy* did not discuss the role of a district such as Congressional District 29 in the Houston area of

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[130] *See* Jackson Pls.' Ex. 64.

[131] *See, e.g., Old Person v. Brown*, 312 F.3d 1036, 1047-49 (8th Cir. 2002) (emphasizing that the same frame of reference should be used for analyzing proportionality and the *Gingles* factors); *Rural W. Tenn. African-Am. Affairs Council v. Sundquist*, 209 F.3d 835, 840-41 (6th Cir. 2000) (using the same six-county frame of reference to examine proportionality and the *Gingles* factors); *Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1220 (11th Cir. 2000) (using the same county as a frame of reference in analyzing all factors); *African-Am. Voting Rights Legal Def. Fund, Inc. v. Villa*, 54 F.3d 1345, 1354-55 (8th Cir. 1995) (using all 28 wards of the city of St. Louis as the frame of reference for analyzing both proportionality and the *Gingles* preconditions).

Harris County, or Congressional District 23 in West Texas, in which Latinos constitute approximately 47% of the citizen voting age population, less than a majority but large enough to constitute an influence district, in assessing proportionality as part of the totality of the circumstances. Plaintiffs are correct in their calculation that six districts in which Latinos hold a majority of citizen voting age population, out of the thirty-two districts that comprise Texas, do not equate to arithmetic proportionality between the number of Latino majority-minority districts and the Latinos' percentage of the citizen voting age population in the State. *De Grandy* emphasizes, however, that the inquiry is not merely mathematical.[132] Rather, *De Grandy* requires an examination of whether the totality of circumstances includes rough proportionality between the number of *effective* majority-minority districts that can be drawn meeting the *Gingles* factors and the minority members' share of the relevant population.[133]

One of the districts that Plaintiffs would create in their demonstration plan, proposed Congressional District

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[132] 512 U.S. at 1023.

[133] *Id.* at 1024. This circuit, along with every other circuit to consider the question, has concluded that the relevant voting population for Hispanics is citizen voting age population. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999); *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (courts "must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority"); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of [§ 2].").

28 has a Hispanic citizen voting age population of only 50.3%, and five of the seven districts have a Hispanic citizen voting age population that is below 60%. Plaintiffs vigorously criticize the legislative plan, 1374C, in part because three of the districts it creates – Congressional Districts 15, 25, and 28 – have Hispanic citizen voting age population numbers that are below 60%. Plaintiffs' own experts and argument reminded this court that because of the lower turnout of Latino voters, a low majority of the Hispanic citizen voting age population does not produce an *effective* Latino opportunity district.[134]

Under Plan 1151C, Congressional District 23 was not an effective minority opportunity district, despite the fact that it had a 57.4% Latino citizen voting age majority.

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[134] Dr. Jerry Polinard, a political scientist testifying for the Valdez-Cox Intervenors, testified that there is "no magic number" as to the level of Spanish-surname voter registration required in order for Hispanics to effectively nominate and elect their candidates of choice, but he noted that "you become comfortable with opportunity districts once you break into those 60%-plus ranges." (Tr. File 8 at 50-51). Dr. Allan J. Lichtman, an expert retained by the Jackson Plaintiffs, testified that reductions in Hispanic citizen voting age population, even to a point where Hispanics still constitute a majority of the electorate, along with low Hispanic voter turnout, can move a district toward "the danger zone" in terms of Latino voting opportunity. (Tr. File 1 at 156-57). Congressman Charlie Gonzalez testified that, "If you just go with population figures . . . [t]hat really doesn't translate to having an effective voice or ability to elect someone of your choice" because the more pertinent indicator is the percentage of Hispanic citizens of voting age who register to vote and actually turn out on election day, which results in far less effectiveness. (Tr. File 1 at 118-19). Congressman Ruben Hinojosa testified that "along the Texas border region from Brownsville to McAllen to Laredo to El Paso . . . in order to win an election, you need to have about 57, 58% or higher Hispanic voter age population because of the low turnout." (Tr. File 4 at 48).

Plaintiffs specifically criticize Congressional District 15 in Plan 1374C, which has a Hispanic citizen voting age population of 58.5% – reduced from 69.3% in Plan 1151C – as weakened to the extent that it is better classified as a Latino influence district rather than a Latino opportunity district, although other witnesses contradicted this characterization.[135] The legislative plan has one fewer district in which Latinos constitute a majority of the citizen voting age population than the demonstration plan. The legislative plan and the demonstration plan, however, have the same number of districts in which Latinos equal or exceed 55% of the citizen voting age population. The legislative plan has one more district in which the Hispanic citizen

[135] Dr. Keith Gaddie, a political science expert retained by the State, testified in his deposition that in Congressional District 15 under Plan 1374C, Latinos would control the primary elections but, if turnout was low, might not unilaterally control the outcome of general elections, although Latino candidates of choice would generally be elected. (*See* Gaddie Dep., Jackson Pls.' Ex. 140 at 46-47; Gaddie Report, Jackson Pls.' Ex. 141 at 8). Dr. Gaddie submitted regression data showing that in Congressional District 15, in seven primary or runoff elections, all the Latino candidates of choice would be successful, and five out of six Latino candidates of choice would win in the general elections. (Gaddie Report, Jackson Pls.' Ex. 141 at 7-8). Dr. Lichtman concluded that the turnout of Latino voters in the general election decreased from a mean of 52% under Plan 1151C to a mean of 38% under Plan 1374C, but testified that Congressional District 15 remains a minority opportunity district rather than an influence district. (Lichtman Report, Jackson Pls.' Ex. 1 at 69; Tr. File 1 at 156, 166-67). Dr. Richard Engstrom, an expert retained by the GI Forum Plaintiffs, testified that in Congressional District 15 under Plan 1374C, there was no racially contested election that he examined in which the Latino-preferred candidate lost and that the reduction in Latino turnout in the general election did not make Congressional District 15 ineffective as a Latino opportunity district. (Tr. File 7 at 53, 64-65; *see* Table 3 of Addendum to Engstrom Report, GI Forum's Ex. 130).

voting age population exceeds 60% than the demonstration plan.[136]

The GI Forum Plaintiffs have shown neither that seven districts can be drawn, meeting the threshold *Gingles* requirements, that have a majority of Hispanic citizen voting age population, nor that all such districts, if they could be drawn, would function effectively as Latino opportunity districts. We reject the claim of the GI Forum Plaintiffs that § 2 demands a seventh Hispanic citizen voting age population majority district in South and West Texas. Part of the analysis of the dilution claim, to which we now turn, will explain why we believe the six Hispanic citizen voting age population majority districts drawn in Plan 1374C are effective Hispanic opportunity districts.

C

It is undisputed that Plan 1374C eliminated Congressional District 23 as a district with a Latino majority

[136] The GI Forum provided an analysis, as follows:

	1385C		1374C	
Congressional district	HVAP	HCVAP	HVAP	HCVAP
15	68.7	63.2	64.0	58.5
16	72.7	67.7	74.8	69.9
20	60.7	57.9	63.6	60.8
23	63.5	56.9	50.9	45.8
25	63.8	58.4	63.4	55.0
27	63.5	59.9	64.2	60.4
28	54.3	50.3	60.1	56.2

(GI Forum's Post-Trial Br. at 14).

citizen voting age population for the political purpose of increasing Republican voters in the district and shoring up the reelection chances of the Republican incumbent. To avoid retrogression, Plan 1374C added a new Latino majority citizen voting age population district to the east and reconfigured the existing districts. Plaintiffs complain that the weakening of Congressional District 23, preventing it from continuing to move toward becoming an effective opportunity district, results in dilution in violation of § 2. Plaintiffs argue that the dilution cannot be addressed by the creation of Congressional District 25 as a Latino opportunity district. Plaintiffs also complain that even if dilution is to be measured on a broader basis than a single district, Plan 1374C is dilutive because the reconfiguration of Congressional Districts 15, 28, and 27 weakens Latino voting strength in these districts.

Congressional District 23 is unquestionably not a Latino opportunity district under Plan 1374C. The map drawers divided Webb County, which is 94% Latino. This change removed reliably Democratic voters in Laredo out of Congressional District 23. Under Plan 1374C, the Hispanic citizen voting age population is 46%, reduced from 57.5% in Plan 1151C; the percentage of Spanish-surnamed registered voters is 44% under Plan 1374C, reduced from 55.3% in Plan 1151C. Even as configured under Plan 1151C, however, Congressional District 23 did not perform as an effective opportunity district. The GI Forum Plaintiffs' regression analysis of election data showed that Latino candidates of choice were elected in five out of eight racially contested elections from 1994 to

2002.[137] The record showed, however, that Latino voters in Congressional District 23 were voting against the Republican candidate Bonilla by larger margins in each successive election. Latino voting strength in Congressional District 23 is, unquestionably, weakened under Plan 1374C. The GI Forum regression analysis of election data for Congressional District 23 under Plan 1374C showed that the Hispanic candidates of choice won only one out of eight racially contested elections from 1994 to 2002.[138] Dr. Gaddie's regression data showed that, in Congressional District 23 under Plan 1374C, Hispanic candidates of choice won seven out of seven statewide primaries, but none of the six Hispanic candidates of choice in general elections carried the district.[139]

Plaintiffs claim that the map drawers impermissibly reduced Hispanic voting strength in Congressional District 23 to pursue their political end. Plaintiffs urge that the political end could have been achieved by leaving Webb County whole and redrawing Congressional District 23 to put Bonilla's home in Congressional District 11, where he could have run in an open seat. The State points out that this approach would not have served either the political goal of incumbency protection or of increasing Republican districts, since Congressional District 11 already reliably elects Republicans in congressional and other elections. The change to Congressional District 23 served the dual goal of increasing Republican seats in general and protecting Bonilla's incumbency in particular, with the additional

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[137] GI Forum's Post-Trial Br. at 15.

[138] Table 3 of Addendum to Engstrom Report, GI Forum's Ex. 130.

[139] Gaddie Report, Jackson Pls.' Ex. 141 at 9-10.

political nuance that Bonilla would be reelected in a district that had a majority of Latino voting age population – although clearly not a majority of citizen voting age population and certainly not an effective voting majority.

Plaintiffs argue that the admittedly political decision to draw the line through the city of Laredo, placing the largely Democratic, Hispanic voters in Congressional District 28 to the east and "stranding" 359,000 Hispanics in Congressional District 23, where they will be submerged in a Republican, Anglo majority district, violates § 2. *De Grandy,* however, rejected the claim of separating heavily Hispanic neighborhoods, fragmenting them in certain districts and packing them into others, as a basis for liability, even if the *Gingles* factors are met, because the totality of the circumstances included a showing that Hispanic voters had effective voting majorities in the relevant area in rough proportion to the their voting age population.[140]

Typically, vote dilution claims address redistricting schemes that take a minority group whose members have the potential to comprise a numerical majority in a geographically compact district and disperse the group across two or more districts, thereby precluding the minority members from constituting an effective majority in either one.[141] Plan 1374C, however, does not produce such an

[140] 512 U.S. at 1015-16. The Court noted in *De Grandy* that findings that certain lines were drawn to separate portions of Hispanic neighborhoods, while others drew several Hispanic neighborhoods into a single district, in themselves, "would be to say only that lines could have been drawn elsewhere, nothing more." *Id.*

[141] *See, e.g., Voinovich,* 507 U.S. at 153.

effect in South and West Texas. Instead, Plan 1374C changes the district boundary in a way that divides Democratic Hispanic voters in Webb County, keeping half in Congressional District 23, in which Republican voting strength is increased and Hispanic voting strength is weakened, and placing half in Congressional District 28, in which Latinos have a clear majority of the citizen voting age population, even after a new district, 25, is added as a majority Latino citizen voting age population district. The Legislature also reconfigured Congressional Districts 15, 28, and 27 in ways that both achieved equal population distribution and preserved the majority Latino citizen age voting populations in each of those districts.

Plaintiffs rely on *Shaw v. Hunt* (*Shaw II*)[142] to argue that the State cannot "offset" the reduction of Latino voting strength in Congressional District 23 by creating a new Latino majority citizen voting age district, Congressional District 25, because to do so would "swap" the voting rights of citizens in Congressional District 23 for the rights of those in new Congressional District 25. In *Shaw II,* the Court held that the creation of a remedial district in one area of a state, where polarized voting existed but where a compact majority-minority district could be not drawn, could not compensate for the failure to place a remedial district in another area where it was possible to draw a compact majority-minority district and where polarized voting also existed.[143] The Court held that a bizarrely shaped district "somewhere else in the State"

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[142] 517 U.S. 899 (1996).

[143] *Id.* at 917.

does not remedy the "vote-dilution injuries suffered" by minority voters residing where the remedial district could have been drawn.[144] The Court rejected a district drawn in the center of the state to remedy the dilution injury of voters on the southeastern side of the state, not because there were differences in polarization, but because a remedial *Gingles* district could not be drawn in the part of the state that the map drawers selected.[145] In this case, by contrast, in South and West Texas, six *Gingles* Latino citizen voting age population majority districts could be and were drawn.[146] The Legislature did not place the lines of those districts in parts of the State where the *Gingles* requirements were not satisfied; the problem present in *Shaw II* is not involved in this case.

Analysis of the *Gingles* factors shows that the Latino population is sufficiently numerous and distributed as to support the creation of a number of effective districts in South and West Texas with a majority of Latino citizen voting age population. The *Gingles* districts in South and West Texas could be drawn in different ways, within the constraints of geography and population distribution. Both Plan 1151C and Plan 1374C have six districts with a

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[144] *Id.*

[145] This case reflects what commentators have recognized as a tension in the cases under § 2 between recognizing the individual right to an undiluted vote and the fact that dilution can be determined and remedied only by addressing the aggregate treatment of group members. *See generally* Heather K. Gerken, *Understanding the Right to an Undiluted Vote,* 114 HARV. L. REV. 1663 (2001).

[146] Indeed, in arguing for an additional Latino majority citizen voting age population district, the GI Forum Plaintiffs emphasize that the *Gingles* criteria are met throughout the South and West Texas area.

majority of Latino citizens of voting age. The choices available to the State included the lines of Plan 1374C, which created a new remedial district that had not been present under the previous plan, or the lines of Plan 1151C, keeping Congressional District 23 as a bare majority Hispanic citizen voting age population district, but not drawing another district with a stronger Latino citizen voting age population majority. Most of the Plaintiffs argue that the State should be compelled to return to the lines of Plan 1151C for South and West Texas. Plaintiffs do not argue that the State should both retain the lines of Congressional District 23 under Plan 1151C and add a new majority Hispanic citizen voting age population district along the lines of Congressional District 25. Indeed, there is neither sufficiently dense and compact population in general nor Hispanic population in particular to support such a configuration. But to say that the State could have retained the lines of Congressional District 23 drawn under Plan 1151C and not created a third district based in the Rio Grande Valley with a majority of Hispanic citizen voting age population is different from saying that the State was obligated to make that choice. *Shaw II* does not preclude the State from choosing where and how to draw majority-minority districts in areas where *Gingles* is satisfied. The states retain broad remedial power to choose where and how to draw remedial districts.[147] As the Court noted in *Shaw II*, even if

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[147] *See Bush v. Vera*, 517 U.S. 952, 978 ("the States retain a flexibility that federal courts enforcing § 2 lack . . . insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability"); *see also Lawyer v. Dep't of Justice*, 521 U.S. 567, 575-77 (1997).

a violation of § 2 is shown, it does not confer on individual plaintiffs "the right to be placed in a majority-minority district" because "[s]tates retain broad discretion in drawing districts to comply with the mandate of § 2."[148]

To examine whether Plan 1374C impermissibly dilutes the votes of Latinos in South and West Texas, this court must conduct a "comprehensive . . . canvassing of relevant facts" making up the totality of the circumstances, including proportionality, to determine whether the districts drawn under Plan 1374C in South and West Texas are effective Latino opportunity districts.[149] Congressional District 23 is clearly not a minority opportunity district; Congressional Districts 16 and 20 do clearly provide effective Latino citizen voting age population majorities. The disputes center on whether Congressional Districts 15, 25, 28, and 27 as drawn in Plan 1374C will be effective Latino opportunity districts.

Some of the relevant data from the voluminous record is as follows:

	Congressional District	%HCVAP	% SSR (2002)
1151	15	69.3	67.0
1374	15	58.5	56.7

[148] 517 U.S. at 917 n.9; *cf. Georgia v. Ashcroft*, 123 S.Ct. 2498, 2511 (2003) (under § 5, a state may choose to create a certain number of effective majority-minority districts or a greater number of minority influence districts).

[149] *De Grandy*, 512 U.S. at 1011.

1151	25	18.6	15.2
1374	25	55.0	55.6
1151	28	61.4	59.6
1374	28	56.2	54.3
1151	27	63.5	61.6
1374	27	60.4	58.0

The parties also presented detailed regression analyses of election data, performed by different experts.[150] The regression analyses confirmed that in Congressional Districts 15, 25, 28, and 27 under Plan 1374C, the Latino candidate of choice won in nearly every primary and runoff examined. The GI Forum's regression analysis of election data reveals that under Plan 1374C, Latinos elected their candidate of choice in eight out of eight racially contested elections from 1994 to 2002 in every one of the six Latino majority citizen voting age population districts, including Congressional District 15.[151] Dr. Gaddie's

[150] Table 3 of Engstrom Report, GI Forum's Ex. 89; Table 3 of Addendum to Engstrom Report, GI Forum's Ex. 130; Attachments to Gaddie Report, State's Ex. 31.

[151]

Congressional District	Number of Times Latino-Preferred Candidate was Elected under Plan 1374C in Eight Racially-Contested Elections from 1984-2002
15	8
16	8
20	8
23	1

(Continued on following page)

report similarly concluded that the Latino candidate of choice won in seven of seven primaries and five of six general elections in Congressional District 15.[152] In Congressional District 25, Dr. Gaddie concluded that Hispanic candidates of choice carried seven of seven statewide primaries and six of six statewide general elections involving candidates of different ethnicity or race, and that in the 2002 contested statewide Democratic primaries and statewide general elections, Hispanic candidates of choice prevailed in five of six primaries and all fifteen general elections.[153] In Congressional District 27, Dr. Gaddie concluded that Hispanic candidates of choice won seven of seven statewide primaries and five of six statewide general elections involving candidates of different ethnicity or race.[154] In Congressional District 28, Dr. Gaddie concluded that Hispanic candidates of choice prevailed in all seven statewide primaries and all six statewide general elections involving candidates of different ethnicity or race.[155]

Although Dr. Lichtman expressed concern when testifying for Plaintiffs that Congressional District 15 and Congressional District 25 might be marginal, or moving

25	8
27	8
28	8

(GI Forum's Post-Trial Br. at 15).

[152] The one Hispanic-preferred candidate loss occurred when 37% of the Hispanic voters supported a Hispanic Republican over an Anglo Democrat. (Gaddie Report, Jackson Pls.' Ex. 141 at 8).

[153] *Id.* at 10.

[154] *Id.* at 11.

[155] *Id.*

toward a "toss-up," he acknowledged on cross-examination that all four of the districts at issue, 15, 25, 27, and 28, are Hispanic opportunity districts, defined as a district in which Hispanic voters have an effective opportunity to control outcomes in both primary and general elections.[156] Dr. Lichtman expressed concern that in Congressional District 25 under Plan 1374C, while Hispanic voters would control the primaries, Congressman Lloyd Doggett, the incumbent in Congressional District 10 under Plan 1151C and an Anglo Democrat, might run and win the general election without a majority of Hispanic votes.[157] Dr. Lichtman nonetheless agreed that Congressman Doggett has had "overwhelming Latino support" in his current congressional district.[158]

Several witnesses expressed particular concern over Congressional District 15, which under Plan 1374C has a Latino citizen voting age population of 58.5% and a Spanish-surnamed registered voter population of 56.7%. Although these numbers are lower than the levels that had been present in Congressional District 15 under Plan 1151C, the regression analyses showed that the Hispanic-preferred candidate won every primary and runoff election studied, and lost in only one general election out of six.[159] Both Dr. Lichtman and Dr. Engstrom testified that Congressional District 15 was a minority opportunity district,

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[156] Tr. File 1 at 157, 167-68.

[157] *Id.* at 151-52.

[158] *Id.* at 153.

[159] Gaddie Report, Jackson Pls.' Ex. 141 at 8.

although not as strong as it had been under Plan 1374C.[160] In contrast, Dr. Polinard testified that given this reduction in strength, Congressional District 15 was no longer an effective or performing opportunity district, merely an influence district.[161]

In Plan 1151C, Congressional District 27 included all of Cameron County along the border, but only part of Nueces County to the north. In Plan 1374C, Congressional District 27 includes all of Nueces County but divides Cameron County. The result did not significantly change the relevant data. In Plan 1374C, Congressional District 27 has a Hispanic citizen voting age population of 60.4% and a Spanish-surnamed registered voter population of 58%, reduced from a Hispanic citizen voting age population of 63.6% and a Spanish-surnamed registered voter population of 61.6% under Plan 1151C.[162] As noted, the regression analyses showed that Hispanic candidates of choice won seven of seven statewide primaries and five of six statewide general elections involving candidates of different ethnicity.[163] Dr. Lichtman testified that Congressional District 27 under 1374C is a minority opportunity district.[164] Dr. Engstrom testified that Congressional

[160] Lichtman Test., Tr. File 1 at 167; Engstrom Test., Tr. File 7 at 64-65.

[161] Tr. File 8 at 53-54, 64.

[162] Gaddie Report, Jackson Pls.' Ex. 141 at Table 3.

[163] *Id.* at 11.

[164] Tr. File 1 at 166-67.

District 27 in Plan 1374C is a district in which Hispanics have the opportunity to elect their preferred candidate.[165]

Congressional District 28 under Plan 1374C includes part of Laredo in South Texas and extends north to the relatively heavily populated areas of Central Texas. The demographic figures show that the district maintains a decisive Hispanic citizen voting age population majority, although reduced from the levels present under Plan 1151C. In Congressional District 28 under Plan 1374C, the Hispanic citizen voting age population is 56.2% and the Spanish-surnamed registered voter population is 54.3%, slightly less than the 61.5% of Hispanic citizen voting age population and 59.6% Spanish-surnamed registered voter population under Congressional District 28 in Plan 1151C.[166]

At trial, witnesses familiar with the areas covered by Congressional Districts 15, 25, 27, and 28 and with the difficulties faced by candidates supported by Latino voters expressed concern as to whether these districts would be effective as Latino opportunity districts.[167] The witnesses testified that the size of the districts; the fact that they include several media markets; and the fact that they combine communities along the border with communities in Central Texas, with diverse needs and interests, could

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[165] Tr. File 7 at 53-54. Again, Dr. Polinard disagreed, testifying that Congressional District 27 was weakened as compared to Plan 1151C to the point of becoming an influence district. (Tr. File 8 at 48-49).

[166] Gaddie Report, Jackson Pls.' Ex. 141 at Table 3.

[167] *See, e.g.*, Gonzalez Test., Tr. File 1 at 123-24; Hinojosa Test., File 4 at 53; Richard Raymond Test., Tr. File 6 at 85-86; Aaron Pena Test., Tr. File 6 at 168.

make it more difficult for thinly financed Latino-preferred candidates to achieve electoral success and to provide adequate and responsive representation once elected.[168] These concerns bear on the extent to which the new districts are functionally effective Latino opportunity districts, important to understanding whether dilution results from Plan 1374C.[169]

The "bacon-strip" districts – Congressional Districts 15, 25, and 28 – are unquestionably long. Congressional District 25 is 300 miles long and 77% of its total population comes from either end of the district; 39% from Travis County in Central Texas and 38% from Hidalgo County at the southern end. Congressional District 15 is also 300 miles long, from Cameron County in South Texas to Bastrop County in Central Texas, and its population is also concentrated at either end. Congressional District 28 runs nearly 300 miles from Hays County south to Zapata County on the border with Mexico. Districts that began in the same area in Plan 1151C were also long and relatively narrow, extending from the border of South Texas to Central Texas, although not as far. The record does not disclose the number of media markets covered in the districts under Plan 1151C, but it is clear that several of

[168] These concerns also bear on Plaintiffs' *Shaw* claim that the map drawers subordinated traditional districting concerns, such as compactness and respecting communities of interest, to the goal of collecting enough Latinos to achieve a majority of citizen voting age population in the districts. *See* Part VI.D.

[169] As *De Grandy* makes clear, the ultimate conclusions about equality of opportunity are to be based on a comprehensive examination of the relevant facts. 512 U.S. at 1011; *see also Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390-91 (8th Cir. 1995).

the areas joined in districts under Plan 1374C were also joined together in districts under Plan 1151C. It is also clear that adding a third district based in the Rio Grande Valley made each of the three districts extend north and include residents of both the Rio Grande Valley and Central Texas. While Latino residents in both areas generally have lower socio-economic indicators than Anglos, the evidence at trial showed that the needs and interests of Latino communities on the South Texas border are different from the needs and interests of Latino communities in Central Texas. The issue is whether these features mean that the newly-configured districts dilute the voting strength of Latinos.

At trial, the court was greatly assisted by the testimony of elected officials from the districts at issue. These witnesses, including Congressman Hinojosa, representing Congressional District 15; State Representative Aaron Pena, who resides in Congressional District 15 and represents a district located in Congressional District 25; State Representative Jim Solis from Cameron County in Congressional District 27; and County Judge Ramon Garcia and County Commissioner Ricardo Godinez from Hidalgo County, were most concerned that the districts would no longer be dominated by the border cities in the Rio Grande Valley. Instead, the districts would also contain a number of constituents from northern, less impoverished communities. The witnesses testified that the size and diversity of the newly-configured districts could make it more difficult for the constituents in the Rio Grande Valley to control election outcomes. For example, witnesses testified that Congressional District 27 under Plan 1374C includes more affluent and higher-turnout voting areas in Nueces County, in contrast to Congressional District 27 in Plan

1151C, which included only half of Nueces County, and expressed concern that Latinos from the border might have difficulty in maintaining control over election outcomes because of low turnout.[170] The district, however, has a Latino citizen voting age majority population of 60.4%, and 58% of the registered voters have Spanish surnames. Witnesses consistently testified that Congressional District 27 under Plan 1374C is a district where Hispanics have an effective opportunity to elect their preferred candidate, and the regression data supports this conclusion.[171] As noted, witnesses testified that Congressional District 25, while a more effective Latino opportunity district than Congressional District 23 had been in Plan 1151C, might elect Lloyd Doggett, a well-known and well-financed Anglo Democrat from Central Texas, to Congress, but acknowledged that many Hispanics support this Anglo Democrat.[172] The legal test of an effective opportunity district is not whether a Hispanic candidate is elected each time, but whether a Hispanic-preferred candidate has an effective opportunity to be elected.[173] Witnesses testified that Congressional Districts 15 and 25 would span *colonias* in Hidalgo County and suburban areas in Central Texas, but the witnesses testified, and the regression data show, that both districts are effective Latino opportunity

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[170] *See, e.g.*, Hinojosa Test., File 4 at 48-53; Peña Test., Tr. File 6 at 167.

[171] *See, e.g.*, Lichtman Test., Tr. File 1 at 166-67; Engstrom Test., Tr. File 7 at 53-54; Gaddie Report, Jackson Pls.' Ex. 141 at 11.

[172] *See, e.g.*, Lichtman Test., Tr. File 1 at 151-53; Peña Test., Tr. File 6 at 168-69; Polinard Test., Tr. File 8 at 57-58.

[173] *See De Grandy*, 512 U.S. at 1014 n. 11; *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 607 (4th Cir. 1996).

districts, with the Hispanic-preferred candidate winning every primary and general election examined in District 25 and, in District 15, winning every primary and runoff election studied and losing in only one general election out of six.[174] Witnesses testified that Congressional District 28 had been, and would continue to be, an effective Hispanic opportunity district, confirmed by the regression data showing that Hispanic candidates of choice won in every primary and general election examined.[175]

A close examination of the voluminous record and the testimony at trial leads to a finding that Plan 1374C does not impermissibly dilute the voting strength of Latinos in South and West Texas in violation of § 2. The newly-configured Districts 15, 25, 27, and 28 cover more territory and travel farther north than did the corresponding districts in Plan 1151C. The districts combine more voters from the central part of the State with voters from the border cities than was the case in Plan 1151C. The population data, regression analyses, and the testimony of both expert witnesses and witnesses knowledgeable about how politics actually works in the area lead to the finding that in Congressional Districts 25 and 28, Latino voters will likely control every primary and general election outcome; in Congressional Districts 15 and 27, Latino voters will likely control every primary outcome and almost every general election outcome; and in Congressional District 23,

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[174] *See, e.g.*, Peña Test., Tr. File 6 at 169-72; Polinard Test., Tr. File 8 at 63-65; Ron Kirk Test., Tr. File 4 at 23-24; Gaddie Report, Jackson Pls.' Ex. 141 at 8, 10.

[175] *See* Lichtman Test., Tr. File 1 at 166-67; Engstrom Test., Tr. File 7 at 54; Gaddie Report, Jackson Pls.' Ex. 141 at 11.

Latino voters will likely control every primary outcome but not the general elections. The fact that Hispanic-preferred candidates will have to campaign for votes not only from Latinos in the Rio Grande Valley but also from Latinos in Central Texas in Congressional Districts 25, 28, and 15 does not mean that Latinos have suffered an impermissible dilution of voting strength in those districts. The fact that Latinos from the Rio Grande Valley in Congressional District 27 are combined with voters from Nueces County, while maintaining a decisive citizen voting age population and Spanish-surnamed registered voter majority, as well as consistent electoral control, does not mean that Latinos have suffered an impermissible dilution of voting strength in that district.[176]

As the Court stated in *Gingles*, "[T]he relative lack of minority electoral success under a challenged plan, when compared with the success that would be predicted under the measure of undiluted minority voting strength the court is employing, can constitute powerful evidence of vote dilution."[177] Whether compared to Plan 1151C or to

[176] *See De Grandy*, 512 U.S. at 1014 n. 11 ("[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race."); *Gingles*, 478 U.S. at 47 ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the *opportunities* enjoyed by black and white voters to elect their preferred representatives.") (emphasis added); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1310 (10th Cir. 1996) ("The lack of electoral *opportunity* is the key."); *Uno v. City of Holyoke*, 72 F.3d 973, 979 (1st Cir. 1995) ("While the statutory scheme does not provide an assurance of success at the polls for minority candidates, it does provide an assurance of fairness.") (citations omitted).

[177] 478 U.S. at 99.

the GI Forum Plaintiffs' demonstration plans, Plaintiffs have not shown an impermissible reduction in effective opportunities for Latino electoral control or in opportunities for Latino participation in the political process. Section 2 guarantees minority voters an effective opportunity to exercise electoral control, not overwhelming electoral majorities or guarantees of success. The totality of facts and circumstances, including those pointing to proportionality, as well as past and predicted election outcomes and evidence as to the likely functioning of the newly-configured districts, does not show a violation of § 2 in South and West Texas under Plan 1374C.

Plaintiffs argue that taking a broad view of the statewide effect of Plan 1374C, dilution results because of the loss of the "influence districts" in other parts of the State in which Latino voters played a role, specifically, Congressional District 24 in Dallas and Tarrant County and Congressional District 10 in Travis County. The State responds in part by pointing to the strengthening of Congressional District 29 in Harris County as a Latino influence district. But Plaintiffs have not urged that additional *Gingles* Latino majority-minority districts can be placed in those areas; they have not identified a wrong in those areas under § 2 that would justify requiring the State to effect a remedy. As the Court explained in *Growe*, "Unless [the *Gingles* prerequisites] are established, there neither has been a wrong nor can be a remedy."[178] Plaintiffs have not met the burden of showing that § 2 forbids the State from making the political choices that primarily

[178] 507 U.S. at 40-41; *see also Harvell*, 71 F.3d at 1393; *Johnson v. Mortham*, 926 F.Supp. 1460, 1473 (N.D. Fla. 1996).

shaped the changes reflected in Plan 1374C because the effects of those changes impermissibly diluted the opportunity of Latinos to participate in the political process.

In *De Grandy,* the Court emphasized that one reason it would not embrace "bottom line" proportionality as a "safe harbor" was that it could make "the most blatant racial gerrymandering in half of a county's single-member Districts . . . irrelevant under § 2 if offset by political gerrymandering in the other half."[179] Plaintiffs argue that the reduction of Congressional District 23 from an emerging effective Hispanic opportunity district for political purposes was political gerrymandering and that the creation of six majority Hispanic citizen voting age population districts in the remainder of West and South Texas resulted from racial gerrymandering. We turn to an examination of this claim.

D

Plaintiffs contend that in Plan 1374C, the map drawers used ethnicity to an unlawful degree and drew districts that reflect a derogation of the traditional districting values of compactness, respect for political lines, and communities of interest. The Supreme Court has phrased the test for a plaintiff bringing such a *Shaw* claim in different ways. In 1995, in *Miller v. Johnson,*[180] the Court struck down a Georgia districting plan on the ground that race had been "the predominant factor motivating the Legislature's decision to place a significant number of

[179] 512 U.S. at 1019.

[180] 515 U.S. 900 (1995).

voters within or without a particular district."[181] That conclusion will generally follow, the Court explained, where "the legislature subordinated traditional race-neutral districting principles ... to racial considerations."[182] In her concurrence in *Bush v. Vera*,[183] Justice O'Connor reaffirmed that test, but explained it in slightly different terms: "[S]o long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny .... Only if traditional districting criteria are neglected *and* that neglect is predominantly due to the misuse of race" is the district presumptively unconstitutional.[184] States are not required to ignore race; indeed, the Supreme Court has acknowledged that states will always be aware of race when they draw district lines.[185] The factor of race or ethnicity may be considered in the process as long as it does not predominate over traditional race-neutral districting principles.[186] The fact that race is given consideration in the process and the fact that majority-minority districts are intentionally created do not suffice to trigger strict scrutiny.[187]

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[181] *Id.* at 916.

[182] *Id.*

[183] 517 U.S. 952 (1996).

[184] *Id.* at 993 (O'Connor, J., concurring).

[185] *Miller*, 515 U.S. at 916; *Shaw I*, 509 U.S. at 646.

[186] *Id.*; *Shaw II*, 517 U.S. at 907 (race is predominate when it is "the criterion that, in the State's view, [can] not be compromised").

[187] *Shaw I*, 509 U.S. at 646; *Bush*, 517 U.S. at 962.

Plaintiffs bear the burden of proving that race was the predominate factor in the Legislature's districting decisions.[188] That burden is significant.[189] As the Court stated in *Miller*, "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices . . . [A]pplication of the Court's standard helps achieve *Shaw's* basic objective of making extreme instances of gerrymandering subject to meaningful judicial review."[190]

Courts analyzing *Shaw* claims frequently examine: (a) district shape and demographics; (b) statements made by legislators and their staff; and (c) the nature of the data used to determine whether race played an excessive and unjustifiable role in the redistricting process.[191] The parties presented evidence of two widely accepted measures of compactness, "smallest circle" and "perimeter to area" scores.[192] The compactness scores of the challenged districts in Plan 1374C are as follows:

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[188] *See Bush*, 517 U.S. at 958-59; *Miller*, 515 U.S. at 916.

[189] *Easley v. Cromartie*, 532 U.S. 234, 241 (2001); *Miller*, 515 U.S. at 928 (O'Connor, J., concurring); *see Cano v. Davis*, 211 F.Supp.2d 1208, 1215 (C.D. Cal. 2002) ("All of the racial gerrymandering cases emphasize that a plaintiff bringing such a claim faces an extraordinarily high burden.").

[190] 515 U.S. at 928-29 (O'Connor, J., concurring).

[191] *See Bush*, 517 U.S. at 959; *Miller*, 515 U.S. at 916-19; *Shaw I*, 509 U.S. at 647.

[192] *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993), cited in *Shaw II*, 517 U.S. at 923, 931.

	CD 23	CD 28	CD 25	CD 15	CD 27
Smallest Circle	3.8	5.0	8.5	6.5	3.1
Perimeter to Area	5.1	5.7	9.6	11.6	5.1

The scores for the corresponding districts in Plan 1151C are:

	CD 23	CD 28	CD 25	CD 15	CD 27
Smallest Circle	4.2	3.7		5.0	3.1
Perimeter to Area	6.1	5.4		8.5	4.1

The general measures of compactness do not lead to a conclusion that the districts in Plan 1374C are bizarre in a *Shaw* sense. Dr. John Alford, an expert witness for the Jackson Plaintiffs, testified that he did not find the perimeter to area scores for Congressional Districts 15, 25, and 28 in Plan 1374C to be troublesome on their own.[193] Neither the smallest circle nor perimeter to area scores of Plan 1374C approach those of districts so bizarrely and irregularly drawn that courts interpret their creation as "an effort to segregate the races for purposes of voting, without regard for traditional districting principles."[194]

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[193] Tr. File 6 at 25.

[194] *Shaw I*, 509 U.S. at 642; *Hunt v. Cromartie*, 526 U.S. 541, 548 n. 3 (1999).

Compactness scores cannot be considered in isolation; the issue is whether a district's shape, as measured by compactness scores, provides evidence of a constitutional violation when considered in relation to the geography and population distribution in the relevant part of the State.[195] Texas has vast geographical areas with widely dispersed population; except for areas around major cities, the State is a challenge for any redistricter who cherishes compactness as a value.[196] For example, Congressional District 23 in both Plans 1151C and 1374C extends approximately 800 miles along the border. In Plan 1151C, Congressional District 17 in the north-central part of the State includes 36 counties. Under Plan 1151C, Congressional District 13 in North Texas is larger than a number of states, spanning 40,000 square miles and 43 counties, but many with fewer than three thousand people.[197]

Texas geography and population dispersion limit the availability of district compactness in the southern and western regions of the state. Under Plan 1374C, the population densities in Congressional Districts 28, 25, and 15, both Anglo and Hispanic, are highest in the Valley and in Central Texas, separated by relatively sparsely populated areas. The high-density population pockets necessary to

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[195] *See Miller*, 515 U.S. at 917 ("Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering . . . becomes much clearer.").

[196] Indeed, Dr. Alford conceded that Texas has not valued compactness during the period in which Texas has engaged in districting. Tr. File 6 at 21.

[197] BARONE, supra note 105, at 1548, 1557, 1576.

achieve the one-man-one-vote requirement are situated at either end of the elongated "bacon-strip" shaped districts. As a result, the boundaries of such "strip" districts in Plan 1374C must reach into Central Texas to obtain the requisite number of people, whether Anglo or Latino. For example, in Congressional District 15, the "dumbbell" district, 90% of the population is in the northern and southern tips. Congressional District 15 was already a "strip" district in Plan 1151C; in Plan 1374C, legislators elongated it to add people because part of the lower half was used to create new Congressional District 25. The smallest circle measure of compactness for the southern and western districts in Plan 1374C, examined in relation to the geography and population, reflect the sheer size and population distribution of the area, rather than a calculated stretch to find voters of a particular ethnic makeup.[198]

The perimeter to area scores for Plan 1374C similarly do not reflect the predominance of ethnicity in drawing the district lines. Perimeter to area calculations are useful for determining whether the map drawers used convoluted lines to bring members of one racial group into a district while excluding members of another racial group. An examination of Congressional Districts 25, 28, 15, and 27, in relation to the population distribution within and without the district lines, does not reveal lines precisely drawn to include Hispanics and exclude Anglo voters, to

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[198] *Cf. Theriot v. Parish of Jefferson*, 185 F.3d 477, 487-88 (5th Cir. 1999) (rejecting a claim of racial gerrymandering where one-man-one-vote considerations and the district's geography substantially limited the ability of map drawers to adhere to compactness standards).

ensure Hispanic citizen voting age majority districts, but rather lines drawn to include enough voters to meet the one-man-one-vote constitutional requirement. An examination of the record, including the maps that show the relationship of Hispanic voting age population to district lines in Congressional Districts 15, 25, and 28, does not show that the districts were extended north in a determined search for Hispanics, in contrast to the way in which the districts in *Miller, Bush,* and *Shaw* twisted or spanned diverse areas to reach every available minority of voting age population.[199] Neither the districts' shape nor their shape in relation to ethnic demographics and population densities provides circumstantial evidence of forbidden racial gerrymandering.

Plaintiffs criticized the Legislature for "cracking" Webb County in a way that removed a large number of Latino voters from Congressional District 23 and placed them in Congressional District 28. The State presented undisputed evidence that the Legislature changed the lines of Congressional District 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede that there is a strong correlation between Latino and Democratic voters. Dr. Lichtman stated in his report that the change in the Webb County district boundary affected an area of voters who were more than 90% Hispanic in voting age population and 86.5% Democratic in voting, according to the 2002 statewide elections.[200]

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[199] *See* Jackson Pls.' Ex. 59-63.

[200] *See* Jackson Pls.' Ex. 1 at 57.

Plaintiffs nonetheless fault the Legislature for drawing a line that separated Hispanic voters, recognizing that they were also reliably Democratic voters, to achieve the political purpose.[201]

The Supreme Court has recognized that a legislature "must have discretion to exercise the political judgment necessary to balance competing interests," and that courts must "exercise extraordinary caution in adjudicating

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[201] The GI Forum Plaintiffs presented Dr. Morgan Kousser, a political scientist, as an expert witness on determining legislative intent to discriminate in a redistricting plan. Dr. Kousser criticized the Legislature for "tak[ing] a correlation between voting and race that's true in Texas now . . . and freez[ing] it in place. . . . It would be possible, had the redistricting chosen other means, that in some future redistricting partisanship and race would not be so highly correlated and that you could attain a partisan end without using racial means. But the Republicans chose to do it in a different way, a way that only achieves the partisan end by using the racial means. And my conclusion is that they chose that on purpose and that was a racially discriminatory intent." (Tr. File 7 at 118-19). Dr. Kousser's conclusion of discrimination is not supported by the current case law, which recognizes that a partisan goal is permissible and that where, as here, there is a strong correlation between race or ethnicity and party, drawing district lines along political lines that may coincide with racial or ethnic lines does not evidence intentional racial discrimination. *See Hunt*, 526 U.S. at 551-52. Dr. Kousser's criticism of the State's choice to create a "safe" Hispanic majority district in Congressional District 25 rather than allow Congressional District 23 to continue as an evolving Hispanic influence district is a criticism of the wisdom of the Legislature's redistricting approach, rather than its legality. As the Supreme Court recently stated in *Georgia v. Ashcroft*, "[A] State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. . . . Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice." 123 S.Ct. at 2511.

claims that a State has drawn district lines on the basis of race."[202] In this case, the State has articulated a political reason for the districting decision, protecting a Republican incumbent. The Supreme Court has recognized that incumbency protection can explain a state's decision to depart from other traditional districting principles as well as, or even better than, race.[203] In *Theriot v. Parish of Jefferson*,[204] the Fifth Circuit rejected a racial gerrymander claim where "the inclusion or exclusion of communities was inexorably tied to issues of incumbency."[205] The decision to move the southeastern edge of Congressional District 23 to the west affected voters whose ethnicity and political partisanship voting achieved strong correlation. Under such circumstances, caution requires this court to defer to the Legislature's discretion.[206] As the Supreme Court has stated, "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be Black Democrats and even if the state were *conscious* of that fact."[207] The

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[202] *Miller*, 515 U.S. at 915-16.

[203] *Bush*, 517 U.S. at 967; *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (recognizing incumbency protection as a legitimate state goal in reapportionment).

[204] 185 F.3d 477 (5th Cir. 1999).

[205] *Id.* at 486.

[206] *See Easley*, 532 U.S. at 242 ("Caution is especially appropriate . . . where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.").

[207] *Hunt*, 526 U.S. at 551; *see id.* at 551-52 ("Evidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation

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geography and population distribution, in relation to the lines drawn in Congressional Districts 15, 23, 25, 27, and 28, do not provide support for Plaintiffs' claim of impermissible racial gerrymandering.

Plaintiffs' primary evidence of a deviation from traditional districting principles is that Congressional Districts 23, 25, 28, 15, and 27 do not observe political lines or respect communities of interest. However, credible testimony from the State's witnesses demonstrated that factors at the heart of traditional districting criteria, including political goals, predominately influenced the numerous decisions embodied in the location of each district line.

In response to Plaintiffs' criticisms, the State provided credible race-neutral explanations for Plan 1374C's county cuts, city divisions, and linking of border and Central Texas communities. The legislative motivation for the division of Webb County between Congressional District 23 and Congressional District 28 in Plan 1374C was political. The State provided evidence that in dividing Webb County, the map drawers in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance.[208] Plaintiffs faulted the inclusion of part of Comal County in Central Texas in Congressional District 28, arguing that legislators drew the line between Congressional District 21 and Congressional

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between race and party preference."); *Bush*, 517 U.S. at 968 (finding that district lines that correlate with race because they are drawn on the basis of a political affiliation that correlates with race do not amount to a racial classification); *see also Shaw II*, 517 U.S. at 905; *Miller*, 515 U.S. at 916; *Shaw I*, 509 U.S. at 646.

[208] Davis Test., Tr. File 11 at 85.

District 28 to place the heavily Hispanic part of Comal County in Congressional District 28. The State provided evidence of a political reason for this county split: to make Congressional District 21 more safe for its Republican incumbent, who was concerned about the effect of including Democratic-leaning voters in his district because of changes to what had been Congressional District 10 in Plan 1151C. Map drawers placed reliably Democratic voters from Comal County into Congressional District 28 to make up for the inclusion in Congressional District 21 of Democratic voters from Travis County resulting from the changes to former Congressional District 10. The State also presented evidence that the part of Comal County placed in Congressional District 28 corresponded to a local election boundary.[209]

Plaintiffs also faulted the inclusion of a heavily Hispanic part of Hays County, also in Central Texas, in Congressional District 28. The State presented evidence that this decision resulted from the Legislature's desire to keep Texas State University, located in Hays County, out of Congressional District 21, which contains the University of Texas at Austin.[210]

Plaintiffs criticized the split that placed part of Cameron County into Congressional District 15. The State responded with credible evidence that Congressional District 15 extends into Cameron County in order to keep the city of Harlingen together in a single district. Plaintiffs

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[209] *Id.* at 81 (explaining that Plan 1374C splits Comal County along a city council district line).

[210] *Id.* at 90-91.

castigated the division of Hidalgo County between Congressional District 15 and Congressional District 25. The State introduced testimony that Congressman Hinojosa asked that the cities of Mission and Edinburg be kept whole, which could be accomplished only by splitting Hidalgo County.[211] Plaintiffs criticized the Legislature for extending Congressional District 27 to include all of Nueces County and part of San Patricio County; under Plan 1151C, only half of Nueces County was included in Congressional District 27. The State introduced evidence that a state senator on the Redistricting Commission, Senator Luna, wanted to keep Nueces County and San Patricio County undivided in a single district. Although that was not feasible because of the need to achieve population balance, the Legislature was able to keep the port of Corpus Christi, located in Nueces County, in a single district with the port communities of San Patricio County.[212] The Legislature's primary map drawer, Bob Davis, and the sponsor of the redistricting bill in the State House of Representatives, Representative Phil King, provided credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria.[213]

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[211] *Id.* at 89.

[212] In all, Plan 1374C split 122 cities and 14 Census Designated Places. By comparison, Plan 1151C split 132 cities and 15 Census Designated Places.

[213] *Cf. Theriot*, 185 F.3d at 485-86 (rejecting a claim of racial gerrymandering where map drawers testified that reapportionment was based on political negotiations).

The Supreme Court has focused on the specific features of a district that cause it to depart from compactness in assessing whether those features are justifiable on traditional districting grounds. In *Bush*, as here, the State attempted to justify its decisions on the traditional ground of partisan politics.[214] In that case, the Court found it significant that "the maps reveal that political considerations were subordinated to racial classification in the drawing of many of the most extreme and bizarre district lines."[215] The *Bush* Court found as clear evidence of the subordination of politics to race the fact that the State was willing, in the course of extending a noncompact tentacle engulfing a pocket of African-American voters, to include a large number of Republican voter tabulation districts in a congressional district ostensibly designed to maximize Democratic power.[216] In the present case, by contrast, the evidence did not reveal such internal inconsistencies. Instead, the Legislature's line-drawing decisions were primarily driven by the political goal of increasing Republican strength in Congressional District 23; the related political goal of ensuring that newly created Congressional District 25, as well as reconfigured Congressional Districts 15, 28, and 27, did not weaken Republican strength in adjacent Congressional District 21; a number of localized political considerations; and the overall need for a balanced population distribution.[217] Although the Legislature

[214] 517 U.S. at 959.

[215] *Id.* at 971.

[216] *Id.*

[217] *See Bush*, 517 U.S. at 964 (suggesting that the achievement of political goals, including incumbency protection, constitutes a traditional districting criterion); *Chen v. City of Houston*, 206 F.3d 502, 507

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clearly intended to create a majority Latino citizen voting age population district in Congressional District 25 and maintain Congressional Districts 15, 28, and 27 as majority Latino citizen voting age population districts, the evidence does not show that it subordinated all other traditional districting criteria to a scheme in which ethnicity predominated.[218] To the contrary, the evidence shows that many of the lines were drawn for such reasons as balancing population, keeping certain cities or areas intact in a district, and satisfying requests from state or federal legislators to keep certain areas together, or place universities in different districts.[219] The evidence also shows that the lines did not make twists, turns, or jumps that can be explained only as efforts to include Hispanics or exclude Anglos, or vice-versa. Plan 1374C does not reveal a subordination of traditional districting principles to ethnic considerations.

Plaintiffs urge that a derogation of traditional districting principles in Plan 1374C is evidenced by the fact that it

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(5th Cir. 2000) (same); *Clark v. Putnam*, 293 F.3d 1261, 1266 (11th Cir. 2002) (same); *see also Shaw I*, 509 U.S. at 651 (citing *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 168 (1977) (opinion of White, J., joined by Stevens and Rehnquist, J.J.)) (characterizing the achievement of population equality as a traditional districting principle).

[218] *See Bush*, 517 U.S. at 962 (noting that the drawing of majority-minority districts is not objectionable unless traditional districting criteria are subordinated to race).

[219] *Cf. Theriot*, 185 F.3d at 487-88 (holding that race was not the predominate factor in a reapportionment based on political negotiation, including incumbency protection, and limited by one-man-one-vote concerns and irregular geography).

links disparate communities in single districts, compromising the ability of the most impoverished and needy areas to obtain necessary representation. Plaintiffs complain that the new plan places border towns with large Hispanic populations in the same districts as Central Texas areas with large Hispanic populations, with ethnicity as their only common characteristic.

According to the Supreme Court, manifestations of a community of interest include, "for example, shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches."[220] The district challenged in *Shaw I* was clearly not driven by communities of interest; the Court described the district as one that "winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas" in an attempt to gather up "enclaves of black neighborhoods" and "even towns are divided."[221] And in *Miller*, because the challenged district reached out to include African-American pockets in several entirely separate urban communities, linked by narrow corridors to a sparsely populated and wholly rural core, the "social, political and economic makeup of the Eleventh District [told] a tale of disparity, not community."[222]

The "bacon-strip" districts of Plan 1374C, Congressional Districts 15, 25, and 28, include disparate communities of interest. Plaintiffs presented evidence of

[220] *Bush*, 517 U.S. at 964.

[221] *Shaw I*, 509 U.S. at 635-36 (internal citations omitted); *see Chen*, 206 F.3d at 512.

[222] 515 U.S. at 908.

differences in socio-economic status, education, employment, health, and other characteristics between Hispanics who live near Texas's southern border and those who reside in Central Texas. However, like the deviations from compactness, these deviations from the traditional districting principle of protecting communities of interest were necessary to meet the constitutional requirement of equal district populations in an area in which population is clustered at the southern tip and the center of the State. Plaintiffs' evidence has not demonstrated that the linking of disparate border and Central Texas Hispanic communities was caused by the factor of ethnicity, rather than the factors of geography and population distribution and the need to achieve equipopulosity.[223] Given the presumption in favor of legislative integrity,[224] we cannot say that the combination of communities of interest here provides circumstantial evidence of the predominance of ethnicity.

The record does not present evidence of statements by legislators or staff supporting the claim that ethnicity predominated in the redistricting process. To the contrary, the emails, statements, and other communications from those involved in the process reveal that politics predominated.[225] Similarly, the data the Legislature used in the districting process does not support a claim of unwarranted

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[223] *Cf. Chen*, 206 F.3d at 513 (noting that, at least when relatively large districts are involved, the mere existence of socioeconomic variations within a district is generally not probative of the predominance of race or ethnicity in districting decisions).

[224] *Miller*, 515 U.S. at 915.

[225] Davis Test., Tr. File 11 at 85-125; King Test., Tr. File 12 at 135-40; Jackson Pls.' Ex. 136.

reliance on ethnicity to make the line-drawing decisions. In *Bush*, the Court condemned the use of census blocks as the fundamental unit for a redistricting plan because the use of such units allows a state to focus too heavily on race in drawing district lines.[226] In the present case, by contrast, the State presented undisputed testimony that the map drawers examined race at the block level in the South and West Texas districts on only a few occasions in order to avoid splitting minority communities.[227]

The Supreme Court has made it clear that a legislature may give consideration to race and ethnicity in the districting process, as long as those factors do not predominate and districting decisions are explainable on grounds other than race.[228] The districting decisions involved in Plan 1374C are best explained by Texas's geography and population distribution and its Legislature's predominately political intent. The record in this case does not show that ethnicity predominated or that the South and West Texas district boundaries in Plan 1374C cannot be explained except by ethnic considerations. Plaintiffs have not met their significant burden of demonstrating racial gerrymandering.[229]

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[226] 517 U.S. at 961-62.

[227] Davis Test., Tr. File 11 at 92, File 12 at 27-28.

[228] *Hunt*, 526 U.S. at 546; *Bush*, 517 U.S. at 993 (O'Connor, J., concurring); *Miller*, 515 U.S. at 916.

[229] *See Bush*, 517 U.S. at 959.

VII

Congressional District 18 is a historically significant African-American majority district in Houston, Harris County, Texas. Its first representative was Congresswoman Barbara Jordan. Jordan was elected at the creation of the district in 1972 as one of the two first African-Americans elected to Congress from the South since Reconstruction and the first African-American elected to Congress from Texas. Congressional District 18 is currently represented by Congresswoman Sheila Jackson Lee. Congressional District 30 is also a historically significant district, the first African-American majority district in Dallas, Dallas County, Texas. Congresswoman Eddie Bernice Johnson represents Congressional District 30. Both Congresswomen Jackson Lee and Johnson provided helpful testimony in this case, adding their voices to those emphasizing that racial polarization and appeals to racial prejudice persist in Texas politics and political campaigns.

Plaintiffs Jackson Lee and Johnson, supported by the NAACP and other plaintiffs, criticize Plan 1374C as diluting the African-American voting strength in Congressional Districts 18 and 30. As to Congressional District 18, Plaintiffs claim that in order to create Congressional District 9 as an additional African-American opportunity district in Houston, Plan 1374C moved high turnout African-American voters out of Congressional District 18 and placed them in Congressional District 9. In Congressional District 18, according to Plaintiffs, those voters were replaced with what the NAACP characterized as "transient and Hispanic voters who are noted for their low

participation in elections."[230] Plaintiffs criticize Congressional District 30 in Plan 1374C on a similar ground. Plaintiffs assert that the plan removes from Congressional District 30 a predominately Anglo area from Irving, Texas and replaces it with an area of largely Hispanic voters from Congressional District 24 in Plan 1151C. Congresswoman Johnson criticized the effects on Congressional District 30 as removing an economically strong area from the district and combining areas of African-American and Hispanic voters, setting up a competition between them that could dilute African-American voting strength. Recognizing that both districts retain a strong African-American majority in Plan 1374C, Plaintiffs rely on projections of the relative growth of the Latino population in the years 2005 and 2010 to support the argument that dilution is threatened, if not present.

The evidence that Plaintiffs present does not support their claim of dilution, present or threatened. Congressional Districts 18 and 30 are effective African-American opportunity districts under Plan 1374C.[231] Plaintiffs' own population and voting data support this conclusion. In Plan 1374C, Congressional District 18 has an African-American voting age population of 40.3% and an African-American citizen voting age population of 48.3%. This is only slightly below the figures that were present in Plan 1151C, which had a Black voting age population of 42.1% and a Black citizen voting age population of 49.8%. Plaintiffs argue that Plan 1374C increases the number of

[230] Texas NAACP Pl.'s Post-Trial Brief at 27.

[231] Gaddie Report, Jackson Pls.' Ex. 141 at 13, 14; *see* Murray Report, Jackson Lee and Johnson Pls.' Ex. 27.

Hispanics and reduces the number of high-turnout African-American voters. The Hispanic citizen voting age population in Congressional District 18 under Plan 1374C is 19.6%, only slightly higher than it was under Plan 1151C (17.9%). And the percentage of Spanish-surnamed voters in Congressional District 18 under Plan 1374C in 2002 is 16%, only slightly higher than the 14.2% under Plan 1151C.[232] Plaintiffs' comparisons of voting patterns in the areas removed from and added to Congressional District 18 under Plan 1374C support the conclusion that the exchange does not dilute the strength of African-American voters in the district. In the U.S. Senate primary for 2002, which pitted African-American candidate Ron Kirk against Latino candidate Victor Morales, African-American candidate Kirk won by 78% in the area removed from the district, and 76% in the area added to the district.[233] In the 2002 general election, the African-American Democratic candidate received 78.8% of the vote in the area removed from the district and 65.8% in the area added to the district.[234] These changes are too slight to support the claim that the strength or status of Congressional District 18 as an effective African-American opportunity district, that has and will reliably elect the African-American candidate of choice, is diluted.

The projections of the population changes between 2000 and 2010 by Dr. Richard Murray, expert witness for Plaintiffs Jackson Lee and Johnson, do not alter this

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[232] Jackson Pls.' Ex. 141 at Table 3.

[233] Jackson Lee and Johnson Pls.' Ex. 27 at 8, Table 6.

[234] *Id.*

conclusion.[235] Indeed, Dr. Murray's projections shed little light on the issue because while he projected the growth of African-American and Hispanic voting age population, he simply did not include any projections of Hispanic citizen voting age population. The failure to include this information makes his projections interesting but of little value to assessing any trend toward future dilution in the relevant period.

As to Congressional District 30, Congresswoman Johnson remained confident that the district would continue to send her to Congress and to elect other African-American candidates of choice. Again, the figures support her conclusion. In Congressional District 30, under Plan 1374C, the Black citizen voting age population is 50.6%, while the Hispanic citizen voting age population is 15.6%. This is only slightly less than the Black citizen voting age population (48.6%) and only slightly more than the Hispanic citizen voting age population (14.3%) in Plan 1151C. And in Congressional District 30 under Plan 1374C, the Spanish-surnamed voters in 2002 accounted for only 12.5% of registered voters. The comparison of vote patterns verifies the continuing strength of Congressional District 30 as an effective African-American opportunity district in Plan 1374C. In the 2002 Democratic primary runoff for the Senate, the African-American candidate of choice, Ron Kirk, received 64.2% of the vote in the area removed from Congressional District 30 and Victor Morales, the Latino candidate of choice, received 35.8% of the vote.[236] In the area added to Congressional District 30,

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[235] *See id.* at 4-9.

[236] Jackson Lee and Johnson Pls.' Ex. 27 at 12, Table 9.

Ron Kirk received 61.9% of the vote and Victor Morales received 38.1% of the vote.[237] Again, the reduction in the votes received by the African-American candidate of choice is too slight to support any inference of dilution. And in the 2002 general election for the Senate, in the area removed from the district, Ron Kirk received 39% of the vote, while he received 61.9% of the total vote in the area added to the district.[238] Dr. Murray's population projections are no more useful in understanding the likely African-American voting strength of Congressional District 30 in 2005 and 2010 than they were for Congressional District 18.[239] Again, Dr. Murray neglects to include any analysis of the likely Hispanic citizen voting age population in the district in the future. He concludes that Congressional District 30 is an effective opportunity district for African-Americans now and offers no basis for believing that its status will change before the next decennial census.

The record, in short, offers no support for the dilution claim as to Congressional Districts 18 and 30. Rather, the arguments underscore that there is no cohesion between African-American and Latino voters in primary elections, particularly those that pit an African-American candidate against a Latino candidate. Although the congresswomen representing these districts ask this court to create districts that are almost exclusively African-American and to create a separate majority Latino citizen voting age population district in Dallas, there is no *Gingles* analysis

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[237] *Id.*

[238] *Id.*

[239] *See id.* at 9-13.

to support this request and the record does not suggest that one could be provided. Plan 1374C does not violate § 2 of the Voting Rights Act.

VIII

For the foregoing reasons, we deny all relief requested by Plaintiffs. Judgment will be entered for Defendants.

Ward, J., concurring in part and dissenting in part.

I.

I join the court's opinion that the law does not preclude the State's Legislature from enacting a mid-decade redistricting plan following a court-ordered remedial plan such as the one enacted by the court in *Balderas v. State of Texas*. I understand the court's opinion to be limited to that question. I write separately to emphasize that it is one question to ask whether the law prohibits a state from enacting a mid-decade redistricting plan. It is quite another to ask whether a state may dictate electoral outcomes by using its Article I authority to thwart the Supreme Court's mandate that votes cast in a Congressional election be given as nearly equal weight as possible.

I do not read the Court's decisions in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) and *Cook v. Gralike*, 531 U.S. 510 (2001) quite as narrowly as my colleagues. Admittedly, those cases rejected state laws which sought to add to the Qualifications Clause either directly as in *Term Limits*, or indirectly, through pejorative ballot descriptions as in *Cook*. From that standpoint they are

easier cases than this one to decide. Nonetheless, these decisions underscored that "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Term Limits,* 514 U.S. at 833-34; *Cook,* 531 U.S. at 523.

Although the state's authority to issue procedural regulations is broad, at some point a state exceeds the power granted to it by the Elections Clause. Modern technology effectively allows a state to dictate electoral outcomes and to favor or disfavor a class of candidates by enabling extreme partisan gerrymandering. I join the court's decision that the Elections Clause does not prohibit mid-decade redistricting and note that there may be legitimate state interests advanced by the effort. Whether the present exercise is a "legitimate" state interest may ultimately be resolved by the Supreme Court in *Vieth v. Jubelirer,* and it seems to me that the Elections Clause would be equally offended by a state's abuse of its authority regardless of whether such abuse occurred in the beginning, the middle, or the end, of a decade following the release of the census data. It is not the timing of the endeavor that creates problems, it is the fact of it.

As noted by the court in *Balderas,* partisan gerrymandering reflects a "fundamental distrust of voters." As in other contexts, extreme partisan gerrymandering leads to a system in which the representatives choose their constituents, rather than vice-versa. I join the court's judgment on the partisan gerrymandering issue given the high bar set in the equal protection context, but I do not join the court's discussion of the issue under Section III.B. That discussion implies that extreme partisan gerrymandering is

okay as long as one party can reverse the tide when it takes over the statewide offices. Dr. Alford's report and testimony provides a detailed analysis of the effects of the extreme partisan gerrymander enacted in this case and the dangers of ignoring these issues. As Dr. Alford explains, these dangers include the encouragement of race-based redistricting. At present, we lack the legal precedent to sustain this challenge under either the Equal Protection Clause or the Elections Clause. The present case fails under the standards announced in *Davis v. Bandemer* and its progeny – even though those standards may or may not ultimately control the disposition of this case, given its timing and that of the arguments in *Vieth v. Jubelirer.*

I join much of the balance of the opinion. I agree that the plaintiffs have not prevailed on their equal protection claims and I agree that no violation of the Voting Rights Act has been shown with respect to Districts 18 and 30. On the remaining § 2 issues, I dissent from the court's opinion related to the issues surrounding District 23 and I concur in the court's judgment insofar as it rejects the claims surrounding District 24 and the claims surrounding Districts 1, 2, 4, 9, 10, 11 & 17. I will first examine the claims related to District 23 and then visit the issue of the influence districts.

II.

A.

The state action in this case unlawfully dilutes the strength of the Latino voters residing in former District 23. To that end, the majority errs when it holds that the State may permissibly "trade off" the rights of minority voters in former District 23 for those in new District 25, a

district created to assist the state with its pre-clearance efforts. I would enjoin the operation of Plan 1374C, permit the Legislature to remedy the violations, and, given the amount of the state that would likely be affected by the changes, order that the elections be conducted under Plan 1151C.

B.

For a statute whose purpose "is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race," *Georgia v. Ashcroft,* 123 S.Ct. 2498, 2517 (2003), the Voting Rights Act receives a curious interpretation in this case. The State's heavy reliance on the flexibility given to it by *Ashcroft* might carry the day with me if Plan 1374C bore any resemblance to the redistricting plan at issue there. It does not.

To begin, the state senate plan at issue in *Ashcroft* was overwhelmingly supported by the minority legislators. Just the opposite is true in this case. Georgia's plan sought to *maximize* the statewide influence of black voters in the State of Georgia. The plan unpacked districts in which blacks constituted a super-majority and (1) maintained the number of majority-minority districts and, at the same time, (2) *increased* the number of "influence districts" in which blacks would be expected to exert a significant – if not decisive – force in the electoral process. Georgia did so by placing black voters into districts that were likely to lean Democratic in the election returns. Because black voters in Georgia usually supported Democratic candidates, the creation of these influence districts made it likely that blacks could exert more influence in the election process

and, correspondingly, increased the likelihood that the elected candidate would be responsive to the black communities' needs. The distinct but related concepts of substantive versus descriptive representation were at issue.

Georgia argued that, although the plan made the super-majority districts somewhat less "safe," its plan as a whole increased the political clout of blacks statewide and therefore did not result in a retrogression in African-American voters' effective exercise of the electoral franchise. *Ashcroft* held that "[i]n order to maximize the electoral success of a minority group, a State may choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice." *Ashcroft*, 123 S.Ct. at 2511. The Court explained that the extent to which a plan created coalition and influence districts were important considerations in the preclearance inquiry. Ultimately, the Court held that the three-judge court, by circumscribing its focus on the unpacked districts, had engaged in too narrow a review of whether the redistricting plan would lead to retrogression at the statewide level. The majority reads *Ashcroft* to give the state flexibility to comply with its obligations under the Voting Rights Act. This is true, to a point. *Ashcroft* was a § 5 case and its language certainly permits the states a certain amount of latitude in determining how to maximize minority voter influence. But I do not read *Ashcroft* – a decision designed to foster minority participation in the political process – to permit the state

to dismantle an existing opportunity district for political purposes so long as the loss is made up somewhere else. Nor do I read *Ashcroft* to make it harder to prove claims under § 2. There was no § 2 question decided in *Ashcroft*. Indeed, one of the grounds Georgia asserted in support of preclearance was the plan's compliance with § 2 of the Voting Rights Act. It is hard for me to believe that the Supreme Court intended to make it harder to prove a § 2 claim by endorsing a statewide approach that the Court believed could have the effect of maximizing minority influence.

Ashcroft recognizes the value of safe districts, coalition districts, and influence districts as means to increase minority voting opportunities and political influence. Make no mistake about it: Despite the State's protestations to the contrary, the changes to District 23 under Plan 1374C were not intended to increase minority voter participation either by strengthening the district or "unpacking" the minority voters into adjoining districts to maximize the overall political strength of Hispanics. These changes were designed to crush these minority voters' participation in the political process.

C.

Under Plan 1000C, in effect after the 1990 census, as well as under its successor, Plan 1151C, District 23 was a protected Latino opportunity district. The district had a Latino citizen voting age population in excess of 50% and was designed to offer Latino voters the opportunity to elect candidates of choice. Under Plan 1000C, the district boasted a Spanish Surname Voter Registration of 53.3%. And under Plan 1151C, that figure was increased to 55.3%. The *Balderas* court implicitly recognized that

District 23 under Plan 1151C was a protected minority opportunity district when it maintained only six Latino majority citizen voting age districts. A review of the statistical package for Plan 1000C reveals that District 23 was one of those six districts. All six (and only those six) had a Spanish Surname Voter Registration in excess of 50%.

As it was configured under Plan 1151C, District 23 offered Latino voters the *opportunity* to elect their candidate of choice. In the present case, Dr. Gaddie, the State's expert, testified that District 23 under Plan 1151C performed for Latino voters in 2002 by electing the Latino candidate of choice in 13 out of 15 statewide elections. He also testified that a district which elects the Latino-preferred candidate of choice in such numbers offers Latinos the opportunity to elect their candidate of choice. Dr. Engstrom, the GI Forum plaintiffs' expert, reached a similar conclusion: He analyzed racially contested statewide elections from 1994 to 2002 and concluded that District 23 under Plan 1151C elected the preferred Latino candidate in 5 out of 8 races and offers Latino voters the opportunity to elect candidates of choice. Dr. Lichtman, called by the Jackson plaintiffs, arrived at the same conclusion.

When it enacted Plan 1374C, the State altered the racial composition of District 23 not to *increase* the likelihood that the Latino community therein would elect a candidate of its choice, but to ensure it would have no practical influence on the congressional election. All of the experts agree that Plan 1374C alters District 23 to the point where it has no hope of functioning as an effective Latino opportunity district. There is no dispute that the State altered District 23 to help re-elect Congressman Henry Bonilla because it predicted that if Latinos continued to constitute a majority of the citizen voting age

population in District 23, Congressman Bonilla would ultimately lose. The evidence is that he is not the Latino candidate of choice. The 2002 congressional election foreshadowed the need for this change: Congressman Bonilla received only 8% of the Hispanic vote. Spanish surname voter registration has correspondingly risen during the same time period and, until the Legislature passed Plan 1374C, had grown to approximately 55% for the district.

The State's solution to this political problem was brutal, yet simple: destroy the opportunity district. The state did so by cracking a cohesive Hispanic community out of Webb County and taking in Anglos from the Texas Hill Country to build a district in which the Hispanic community will not be able to influence the outcome of the election. The majority's characterization of new District 23 as a Latino "influence district" is therefore in error. An influence district is a district in which the minority population carries enough political weight potentially to be the swing vote in the election and command the attention of the representative. A competitive district is the touchstone. Not so with new District 23. The Hispanic citizenship figures have been reduced by so great a margin that the Hispanics in District 23, although having the ability to control the Democratic primary, will lose the general election every time. The undisputed regression analyses confirm this. Contrary to the majority's characterization, the district's very design ensures a lack of competitiveness and a corresponding lack of responsiveness.

There are, however, a total of 359,000 Latinos who continue to reside in new District 23. They object to the State's dismantling of their opportunity district under § 2. The question presented is whether a state can, consistent with § 2, intentionally dilute a minority group's voting

rights in an existing opportunity district to obtain a partisan advantage while, at the same time, offset the effects by creating a new district in another part of the state. The majority's answer is that *Ashcroft* and *Johnson v. De Grandy*, 512 U.S. 997 (1994), permit this sort of line-drawing. I disagree.

D.

Contrary to the majority, I do not read *Ashcroft* or *De Grandy* to encourage the sort of voting rights swap meet put into play by Plan 1374C. The majority effectively reads *Ashcroft's § 5* holding and *De Grandy* to countenance violations of *§ 2* in one part of the state, so long as those violations are "offset" by the creation of new minority opportunity districts elsewhere in the state. The State conceded that this was its position in response to questions from the bench during closing arguments. By its terms, of course, *Ashcroft* says nothing about a state plan which unlawfully dilutes the minority strength in one part of the state and seeks to "offset" that dilution by the creation of a new minority opportunity district in a different part of the state – one of Georgia's contentions was the plan's compliance with § 2 required pre-clearance under § 5.

That *Ashcroft* did not endorse the approach suggested by the State is not surprising. The Court had already answered this question once in *De Grandy* and again in its *Shaw* cases. In *De Grandy*, the state proposed a *per se* rule that proportionality was a safe harbor, insulating any reapportionment plan which provided proportional representation from a Section 2 challenge. In rejecting that proposal, the Court stated that the state's argument rested on an "unexplored premise of highly suspect validity: that

in a given case, the rights of some minority voters under § 2 may be traded off against the rights of other members of the same minority class." 512 U.S. at 1019. Later, in *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (*Shaw II*), the Court made its views even more explicit:

> If a § 2 violation is proved for a particular area, it flows from the fact that individuals in this area "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The vote-dilution injuries suffered by these persons are not remedied by creating a safe majority-black district somewhere else in the State. For example, if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina, as the Justice Department's objection letter suggested, District 12 that spans the Piedmont Crescent would not address that § 2 violation. The black voters of the south-central to southeastern region would still be suffering precisely the same injury that they suffered before District 12 was drawn. District 12 would not address the professed interest of relieving the vote dilution, much less be narrowly tailored to accomplish the goal.
>
> Arguing, as appellees do and the District Court did, that the State may draw the district anywhere derives from a misconception of the vote-dilution claim. To accept that the district may be placed anywhere implies that the claim, and hence the coordinate right to an undiluted vote (to cast a ballot equal among voters), belongs to the minority as a group and not to its individual members. It does not.

Although I recognize that "States retain broad discretion in drawing districts to comply with the mandate of § 2," *Shaw II*, 517 U.S. at 917 n.9 (citing *Voinovich v. Quilter*, 507 U.S. 146, 156-57 (1993); and *Growe v. Emison*, 507 U.S. 25, 32-37 (1993)), I do not read the Court's cases to mean that the "effects" test of § 2, if satisfied, may be defended against by pointing to a political agenda in the affected portion of the jurisdiction and compensation, over the long haul, to other members of the injured group residing elsewhere in the jurisdiction. *De Grandy* rejected the state's proposed safe harbor rule precisely because it encouraged what happened in this case. The court said: " . . . we reject the safe harbor rule because of a tendency the State would itself certainly condemn, *a tendency to promote and perpetuate efforts to devise majority minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity.*" *De Grandy*, 512 U.S. at 1019-20 (emphasis added). New District 25 falls squarely within the scope of this statement.

In this case, the State's redistricting effort mirrors precisely what *De Grandy* cautioned against. The fundamental flaw in the majority's approach is that it fails to appreciate that the Latino districts created in Plan 1374C are not in "the same area" as the *Gingles* districts have been located historically. In the past, the Latino groups have enjoyed participation in the six *Gingles* districts located in Plan 1000C and in Plan 1151C. Although there are still six Latino opportunity districts in Plan 1374C, those new districts take in quite different geography and population. The State took in, geographically, 10 additional counties and portions of 4 others which span an area of at least 8,500 square miles. The State also took in

more than 651,000 additional persons. To accomplish its goals, the state was forced to create new District 25 which reaches from the border in excess of three hundred miles north to include Hispanic population in Travis County.

In its effort to validate Plan 1374C, the majority first tells us that District 25 was created "[t]o avoid retrogression under Section 5." Quite correctly, the majority recognizes that the changes to District 23 resulted in the dilution of the Latino vote therein. But then, when confronted with the language of *Shaw* and *De Grandy* which prohibits exactly this sort of trade-off, the majority explains that the state enjoys the flexibility under *De Grandy* to draw *Gingles* districts in a different way, so long as it creates a total of six (but only six) districts in which Latinos may elect a candidate of choice. But *Gingles* addresses liability under § 2. No one suggests the State needed to create new District 25 to guard against a potential vote dilution challenge by a resourceful if not aspiring coalition of Latinos living in Travis County and those living in the *colonias* over 300 miles away near the Texas-Mexico border. At yet another place in its opinion, the majority implicitly repudiates this very species of § 2 liability when it holds to be non-compact the GI Forum's demonstration districts – even though all have better compactness scores than new District 15 in Plan 1374C.

The majority blurs the distinction between the State's flexibility to comply with its *procedural* obligations under § 5 and its flexibility to comply with its *remedial* obligations under § 2. The majority misses this distinction because it fails to appreciate the fact that the Latino

opportunity districts in Plan 1374C take in different populations and geography than before.[1] The majority's initial reaction to new District 25 was of course correct: the State created new District 25 to "offset" the loss of old District 23 for § 5 preclearance purposes. But the underlying forces driving the need for new District 25 are inconsistent with *Ashcroft*'s rationale. At issue in *Ashcroft* was Georgia's decision to unpack black opportunity districts to *increase* the statewide political might of the minority voters. Central to *Ashcroft's* willingness to provide states with flexibility was the Court's recognition that the plan was intended (or at least contended to be intended) to *increase* minority voting strength statewide. Unlike the efforts in *Ashcroft*, the dilution of Latino voting strength in District 23 was not designed to *maximize* Latino voting strength statewide, and, as noted, the majority's characterization of District 23 as continuing on as some sort of an Hispanic *influence* district is error. Under the majority's theory of influence districts, we are left to conclude that Congressman Bonilla will be *more* responsive to the Latino community now that they constitute over 10% *less* of his constituency.

This turns *Ashcroft* on its head. District 23 is designed so that the Hispanic population therein *will not* influence the outcome of the elections and *will not* tend to make the elected representative more responsive to the community's needs. The only thing the Hispanic community in District

[1] To be sure, under any configuration, the geography spanned by the districts in South and West Texas is vast. But some of the districts include large areas to capture population; new District 25 is noncompact because of its need, under § 5, to capture *Hispanic* population.

23 will influence is the total population of the district to meet "one person, one vote" requirements. The state action was designed to increase Henry Bonilla's chance of electoral success at the expense of District 23's dissatisfied Hispanic voters. To suggest that those minority voters cannot prevail on a dilution claim under § 2 elevates the State's political agenda over the individual rights of Latino voters in former District 23. For these reasons, I would reject the State's efforts to trade the rights of Latinos in old District 23 for those in new District 25.

E.

As stated, it is my opinion that the State violated § 2 when it dismantled old District 23 and replaced it with new District 25. If the majority is correct that the State could draw new District 25 to comply with its *Gingles* obligations, then the majority is confronted at once with the GI Forum plaintiffs' dilution claim. These plaintiffs claim that Plan 1374C dilutes the statewide strength of Hispanic voters because it fails to create a seventh Latino majority district. The majority, however, rejects the GI Forum plaintiffs' claims for several reasons. First, the majority opines that the proposed districts will not be effective. Second, the majority holds that the districts are not compact. Third, the majority determines that *De Grandy* proportionality tends to show that Plan 1374C will not have the effect of unlawfully diluting the Latino vote. Finally, the majority suggests that *Balderas* rejected the identical claim. None of these reasons is persuasive.

1.

In this case, if the State is permitted or required to draw *Gingles* remedial districts into the new areas of the state and in the manner in which it did, the GI Forum plaintiffs assert that the *Gingles* preconditions suggest that seven majority Latino districts should be created. I agree. The evidence is undisputed that, under Plan 1385C, sponsored by the GI Forum plaintiffs, Latino voters constitute the majority of citizen voting age population in seven congressional districts in South and Central Texas. *See Valdespino v. Alamo Heights Independent School Dist.*, 168 F.3d 848 (5th Cir. 1999) (interpreting *Gingles* to require consideration of citizen voting age population or "CVAP"); *Campos v. City of Houston,* 113 F.3d 544, 548 (5th Cir. 1997) (same). These districts are District 15 (63.3% CVAP), District 16 (68.0% CVAP), District 20 (58.0% CVAP), District 23 (57.2% CVAP), District 25 (58.4% CVAP), District 27 (59.9% CVAP), and District 28 (50.3% CVAP).

The majority resists the GI Forum plaintiffs' demonstration plan because it believes the plan does not provide seven "effective" Latino districts. I disagree. The majority places great emphasis on the fact that the Hispanic CVAP of District 28 in Plan 1385C is only 50.3%. Be that as it may, under the evidence submitted by the GI Forum plaintiffs, the district elected the Latino candidate in 8 out of 8 elections since 1994, and the vote for the Latino candidate in the most recent elections, 2002, exceeded 55% of the total vote in each of the four elections. *See, e.g.* GI Forum plaintiffs' Exh. 131; (Tr. 12/16/03 a.m. at 29-30). On balance, District 28 is almost identical in performance to District 28 in the State's plan 1374C despite the fact that, in District 1374C, District 28 has an Hispanic CVAP of 56.2%. By contrast, the weakest district in the GI Forum

plaintiffs' demonstration map is District 23, which elected the Latino candidate of choice in 5 out of 8 elections at margins nearly identical to those which led the *Balderas* court to conclude that District 23 was a protected minority opportunity district. Each of the remaining Latino districts in Plan 1385C elects the Latino candidates to office in 8 out of 8 elections. Viewed in the light of these election returns as opposed to simply looking at the CVAP content or any other single statistic, all of these districts perform, in terms of winning elections, at least as well as their counterparts in Plan 1374C.

The majority also relies on the testimony of experts called by other parties, including Dr. Jerry Polinard, an expert witness called by the Valdez-Cox plaintiffs. The majority reads Dr. Polinard's testimony to suggest that in all cases a higher Hispanic CVAP number is necessary to find an effective Hispanic opportunity district. The majority is wrong. In the first place, as set forth above, Dr. Engstrom's analysis of the election results tell a different story. Moreover, Dr. Polinard was in fact testifying about the effects of the districts as drawn in Plan 1374C, not Plan 1385C. What Dr. Polinard said with respect to numbers is:

> I have no magic number. That's going to vary – vary by District. I will state the obvious, that if the Spanish surname voter registration percentage goes up, the opportunity goes up.
>
> I think you become comfortable with opportunity districts once you break into those 60 percent ranges.
>
> (Tr. 12/16/03 p.m. at 50-51).

The majority also cites the testimony of the State's expert with respect to new District 15 to reject as effective District 28 in the demonstration plan. In terms of actual election results, however, new District 15 appears to perform *worse* than the GI Forum plaintiffs' proposed District 28, despite the fact that new District 15 has a higher Hispanic CVAP than proposed District 28.

The truth of the matter is that the effectiveness of a minority opportunity district will vary by the district. A expert might find, for example, a need for a greater Hispanic CVAP in a district ranging from Travis County to the border and covering three or four media markets than would be needed in a district that is somewhat more compact. Under the evidence, all of the districts in Plan 1385C have the numbers to make them effective Latino opportunity districts.

This might be a closer call if the demographic evidence were otherwise. A showing that Latino population growth and voter registration was on the decline might counsel a court to conclude that gains over the short run might be offset by anticipated losses in the end. That is not our record. The evidence establishes that the Latino voter registration as well as overall population growth is *rising*. Over the course of the decade, the only conclusion to be drawn from this evidence is that Latino voting strength in these districts will become stronger, not weaker. The GI Forum plaintiffs have established that their proposed districts would be effective.

2.

The majority also rejects the GI Forum plaintiffs' contention that their districts are "compact." But under

the objective compactness scores, several of the GI Forum plaintiffs' demonstration districts are, on balance, more compact than those in Plan 1374C. Although a few are worse, none of the districts scores worse than District 15 in Plan 1374C. Under the demonstration plan, 5 of the proposed districts have better "perimeter to area" scores than their counterparts in Plan 1374C. None of the districts in Plan 1385C have a perimeter to area score as high as District 15 in Plan 1374C. Under the smallest circle measure, three of the demonstration districts score better, one scores the same, and none is, again, as high as District 15 in Plan 1374C.

The majority disregards these scores, saying the comparison "understates the unusual shapes of the proposed demonstration districts." But it is the majority who overstates the significance of the "unusual" shapes of the districts. Focusing in on the "look" of the map as opposed to the objective scores and population centers, the majority says that District 25 virtually "bisects" District 23 in the demonstration plan. Viewed in the context of a redistricting plan, however, the two districts make perfect sense. District 23 strives to include the border communities of interest along the Rio Grande and, at the same time, retains over 99% of the City of Laredo – a major border population center – in District 23. The portions of District 25 which allegedly "bisect" District 23 are actually the boundaries of Dimmitt County, the total population of which is 10,248. The population of Laredo, 99% retained in District 23, is 176,576. The GI Forum plaintiffs' demonstration plan is, on balance, more compact than the pertinent portions of Plan 1374C.

3.

The majority's principal answer to the GI Forum plaintiffs is that Plan 1374C provides Latinos the opportunity to elect congressional candidates in substantial proportion to their share of the relevant population as a whole under *Johnson v. De Grandy*. I disagree.

a.

In *De Grandy*, the Court noted:

> If the three *Gingles* factors may not be isolated as sufficient, standing alone, to prove dilution in every multimember districting challenge, *a fortiori* they must not be when the challenge goes to a series of single-member districts, where dilution may be more difficult to grasp. Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some. When the question thus comes down to the reasonableness of drawing a series of district lines in one combination of places rather than another, judgments about inequality may become closer calls.

512 U.S. at 1012-13.

Under *De Grandy*, proportionality is one factor to be considered in assessing the totality of circumstances to determine whether unlawful vote dilution has occurred under § 2. *Id.* at 1022. "Proportionality" in this sense involves a comparison between (1) the percentage share of legislative districts in which the population of the protected class has a majority and (2) the protected class's percentage of the relevant population. Proportionality is

one factor to be considered, and it does not create a safe harbor precluding § 2 liability when present, nor does it impose *per se* § 2 liability when absent.

b.

Proportionality does not compel the rejection of the GI Forum plaintiffs' claims in this case. Because of the procedural posture in *De Grandy,* the Court reserved the question whether proportionality should be measured on a statewide basis or by focusing on a smaller area of the jurisdiction at issue. *De Grandy,* 512 U.S. at 1022 ("[w]e have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy."). Other courts have struggled with the question, but many have assessed proportionality by focusing on the nature of the specific Voting Rights Act claims at issue.[2]

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[2] *Old Person v. Brown* did not reach the question because proportionality was lacking under either a statewide or a more narrow geographic scope. 312 F.3d 1036, 1044-46 (9th Cir.2002) ("Our holding that proportionality analysis could not here be limited to the districts of the plaintiffs' residence does not require us to choose between the state or the four counties as frame of reference. In either case, there is a lack of proportionality"). And, the court in *Rural West Tennessee African-American Affairs Council v. Sundquist,* adopted plaintiffs' proposed geographic scope when vote dilution claim focused on particular area of state. 209 F.3d 835, 844 (6th Cir. 2000). *African American Voting Rights Legal Defense Fund v. Villa* measured proportionality of a citywide apportionment plan using the entire city, noting "[w]e also believe that the district court's focus upon the entire city of St. Louis rather than upon the five central corridor wards was consistent with *Johnson*. . . . We agree that *Johnson* stands for the proposition that the proper geographic scope for the comparison is the scope that is pleaded in the complaint and subjected to proof." 54 F.3d 1345 (8th Cir. 1995). Finally,

(Continued on following page)

Under the facts of the present case, *De Grandy* proportionality should be measured by comparing the number of effective Latino congressional districts to the Latino percentage of the relevant statewide population. It is true that the GI Forum plaintiffs propose their Latino districts in the South and West Texas areas; however, it is equally the case that the GI Forum plaintiffs attack the operation of Plan 1374C because of its impact and its overall effect on the Latino voters in the state as a whole. They did not limit their challenge to the effect of Plan 1374C to the areas in South and Central Texas. An integral part of the claim is Plan 1374C's failure to maintain districts *in other parts of the state* in which minority communities might play an influential if not outcome determinative role in the general elections to increase the likelihood that the elected candidate will respond favorably to the minority communities' needs.

The State apparently agreed with this approach until the evidence was in and it became apparent there was a problem under § 2 with 1374C. The State's pretrial submissions addressed proportionality on a statewide basis. In particular, the State's trial brief addressed *De Grandy* proportionality and represented, misleadingly, that proportionality was met under Plan 1374C, because Hispanics "would have a *majority of the population* in 25% of the districts." Revised State Defendants' Trial Brief, filed

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in *Campuzano v. Illinois State Board of Elections*, the court stated "[f]or a plan to provide minority voters equal participation in the political process, it must generally provide a number of 'effective' majority-minority districts that are substantially proportionate to the minority's share of the state's population." 200 F.Supp.2d 905, 909 (N.D. Ill. 2002).

December 3, 2003, at 39 (emphasis added).[3] It was not until after the close of the evidence that the State, or anyone else, contended that proportionality should not be assessed statewide.

There is no risk that assessing proportionality on a statewide basis will lead to an over-representation of Latinos in Congress. For instance, there is no evidence tending to prove that Latinos elsewhere in the state (*e.g.*, the panhandle, Dallas/Fort Worth, or East Texas) constitute a reasonably compact effective voting majority such that they could in the future assert a Section 2 violation in those parts of the state and require the creation of yet additional *Gingles* districts. Such evidence might require the court to assess proportionality on a smaller scale. *Rural West,* 209 F.3d at 844 ("The State complains that by allowing the plaintiffs to define the frame of reference for their § 2 claim, we will enable future litigants to carve up successively smaller areas of the State until they are able to maximize the number of majority-minority legislative districts – a result not countenanced by the Voting Rights Act [but] as the district court pointed out, however, the *Gingles* preconditions operate to prevent just the sort of limitlessly small 'reverse gerrymander' whose specter the State raises here."). In this case, however, the claim is that Plan 1374C dilutes the statewide voting strength of Latinos. That is the proper geographic scope by which to measure *De Grandy* proportionality.

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[3] This statement is misleading precisely because *De Grandy* proportionality examines the ratio of CVAP majority districts to the share of the relevant population.

c.

So measured, Latinos constitute 32% of the total population and 29% of the voting age population in the State of Texas. *De Grandy* proportionality thus suggests that Latinos should comprise an effective voting majority, depending on whether one uses voting age or total population figures, in possibly nine or ten such districts. Under either measure, Plan 1374C fails to provide proportional representation to Latinos. Latinos enjoy the ability to elect representatives of their choice in only six districts: Districts 15, 16, 20, 25, 27 and 28. As a result, Plan 1374C fails to provide proportional representation.

The majority concludes that proportionality should be assessed on the basis of the minority group's percentage of the *citizen* voting age population. The majority overlooks that this question arises in the context of the apportionment of seats to the United States Congress. The seats are apportioned according to total population. From 1990-2000, the Latino growth in Texas accounted for more than 60% of the state's total population. The state thus enjoys the benefit of the total Latino population through an increase in its Anglo congressional delegation, but at the same time seeks to restrict the Latino's opportunity to elect to the fewest number of districts. Latinos are thus counted one way for apportionment purposes, but another when it comes to equal opportunity to participate in the political process. Stated another way, the state seeks the maximum use of the Latino population to gain power but seeks to minimize the sharing of power with the Latinos by using a more restrictive measure.

d.

Even assuming the correctness of the majority's approach, however, 6 districts out of 7 remains at the low end of rough proportionality. For reasons that are apparent from this record, the majority errs when it rejects the § 2 claims by relying on rough proportionality. I would ascribe far less weight to the proportionality issue given the circumstances under which the present case comes to us. We must remember that the State is having to defend this claim because it made the conscious choice to dismantle a minority opportunity district to thwart the growing Latino dissatisfaction with an incumbent Congressman. Just when it became apparent that District 23 was becoming more effective for the class it was intended to protect, the State intentionally altered it. The State thus placed itself in this position and the related position of having to create a new Latino opportunity district to meet a retrogression concern. Although the majority concludes this action is permitted by *De Grandy*, that case rejected a safe harbor rule precisely because such a rule would encourage states to do what Texas did: create an "offsetting" district where none was necessary and substitute one group's voting rights for another.

The weight ascribed to proportionality by the majority allows the State to mask its efforts to thwart the policies underlying the Voting Rights Act. To illustrate, suppose that new District 15 in Plan 1374C fails to perform and does not elect a candidate of choice for Latinos. Suppose further that over the course of the next few years, the Latino community mobilizes and puts pressure on the incumbent. To use *De Grandy* to permit the State at that stage to dismantle District 15 and create a new district somewhere else has a tendency to perpetuate the legacy of

discrimination, not to thwart it. Our record, and the State's action directed toward old District 23, is no different.

4.

Finally, the majority suggests that the *Balderas* court rejected this identical claim. The *Balderas* court did not. It is ironic that the State finds comfort in a remedial order that the Legislature rejected as controlling. Although I agree that the State has the authority to enact a redistricting plan, that new plan must stand or fall on its own merit, and not on any language of the *Balderas* remedial order – an order which must be read in context of Plan 1151C as a whole and which did not purport to address the merits of Plan 1374C. *Balderas* drew a remedial plan without the benefit of either the controlling citizen voting age population data or the most recent election returns. Those data are now available. Under those figures, seven districts may be drawn in which Latino voters will have the opportunity to elect their candidates of choice to Congress.

Balderas was primarily motivated by the desire to meet the Supreme Court's holding that a federal court should draw a remedial plan bearing in mind the requirements of the Voting Rights Act. The remedial order was thus forced to straddle the requirements of § 2 and § 5. At that time, prior to *Ashcroft*, a compelling argument could be made that a reduction in the overall Latino voting strength in any of the particular districts would have worked a retrogression prohibited by § 5. One of the forces driving the *Balderas* court's rejection of a seventh Latino district in the Central and South Texas regions was that

very concern. But the Attorney General has concluded, at least as to Plan 1374C, that an increase to the relevant geographic and population locations to accommodate six Latino districts, coupled with a corresponding reduction in the strength of District 15, will not lead to a retrogression of the minority group's effective exercise of the electoral franchise. It is incumbent upon us, therefore, to assess whether, by embracing that increased geographic area and drawing new districts, the State has drawn its districts in a way that will dilute the strength of the Latino vote therein.

The state is trying to have its cake and eat it too. The *Balderas* court found no vote dilution based on the totality of the circumstances then before it. The *Balderas* court expressly noted that its remedial plan increased the Latino voting strength in District 24 and created a minority opportunity district in District 25 and, in doing so, hardly left "a bleak terrain" for minority voting opportunities. Similarly, under Plan 1151C, Latino voters enjoyed substantial influence over the outcome of the elections in, at a minimum, Districts 10, 11 and 17 which influence, in turn, increased the likelihood that the elected candidates from those districts would be responsive to the needs of the minority communities. The presence in 1151C of districts in which the candidates are responsive to the needs of the minority community is a relevant consideration under the *Zimmer* factors. Under the totality of the circumstances, the failure to create additional opportunities did not lead to a dilution in statewide Latino voting strength. Section 2 is concerned with effects, and the State is unable to point to the presence of these minority influence districts to counterbalance its failure to create a seventh Latino majority-minority district. The State

cannot rely on the *Balderas* order to overcome this particular Section 2 challenge any more than the plaintiffs can rely on it to defeat the Legislature's ability to redistrict mid-decade. *Balderas* therefore stands as no opposition to the GI Forum plaintiffs' Section 2 claim.

III.

My opinion that the State violated § 2 when it dismantled old District 23 and replaced it with new District 25 renders it unnecessary to assess whether the "bacon strip" districts violate the principles set forth in *Shaw v. Reno* and its progeny.[4] Restructuring of the South and Central Texas districts is necessary to remedy that § 2 violation. It is doubtful that the court could, consistent with *Upham v. Seamon*, simply remedy the areas adjoining District 23, without treading on the state's policy as reflected overall in Plan 1374C. It is possible that any new configuration would cure any *Shaw* issues. For present purposes, it is enough for me to embrace the wisdom of Dr. Alford's opinion that any *Shaw* issues present in South and Central Texas under Plan 1374C resulted from the state's own action in altering District 23 for political purposes. The ripple effect of changes to this area of the map, however, would likely be felt across a large portion of the state. *E.g., Abrams v. Johnson*, 521 U.S. 74, 86 (1997). Given the primary schedule, and the evidence in the record about the difficulties of conducting the elections even under the plan as enacted by the State, I would grant

[4] I agree that District 29 in Houston is not subject to such a challenge.

the Legislature the opportunity to cure these defects and order the elections to be held under Plan 1151C, a plan that is beyond dispute a legal one.

IV.

This is not an easy case. My colleagues' concerns with interfering with legislative and political prerogatives are not without force, and I agree that politics motivated many of the decisions involved in the case. As difficult as the case is, however, I am unable to agree with the majority that § 2 was not violated when the state enacted Plan 1374C. I therefore dissent from that portion of the court's opinion.

V.

As I stated at the outset, I reluctantly concur with the court's judgment insofar as it addresses the claims related to the dismantling of District 24. It is not so much my agreement with the majority's assessment of the facts that causes me to do so, but rather it is instead the lack of clear guidance from the Supreme Court or the circuits regarding the extent to which *Ashcroft's* recognition of the value of coalitional and influence districts carries over into the § 2 context. At the present time, controlling law compels the conclusion reached by the majority.

The question whether § 2 creates influence dilution liability is a close one – made so by language in *Ashcroft* recognizing the importance and the value of such districts. My philosophical trouble with the controlling law's sacrosanct view of the 50% rule flows from the fact that the Voting Rights Act endeavors to put minority voters on an equal footing in all aspects of the political process. *See*

generally Stanley Pierre-Louis, *The Politics of Influence; Recognizing Influence Dilution Claims Under Section 2 of the Voting Rights Act,* 62 U. Chi. L.Rev. 1215, 1224 (1995) ("Indeed, Section 2 refers to open participation for minority voters in the 'political processes leading to nomination or election' as well as the opportunity 'to elect representatives of choice.'") Just as minority voters are not immune from the obligation to "pull, haul, and trade to find common political ground," neither should a redistricting plan have the effect of operating unequally on a minority group's ability to engage in these very activities.

Participation in the political process is hard work. It is harder for minority groups who have suffered the legacy of a history of official discrimination. We heard compelling testimony from Deralyn Davis, the Chairman Emeritus of the Texas Coalition of Black Democrats, about just how hard it is for minority voters in the state of Texas. She described the grassroots efforts of her and others to build coalitions, mobilize, and increase the African American influence in the state's political machine. The efforts did not focus on one location in the state, but extended statewide. The testimony of others was consistent.

Under Plan 1000C, in use until the 2000 census, the black citizen voting age population of District 24 was 20.1%. Under Plan 1151C, the court drawn plan, District 24 has a black voting age population of 21.4%. The electorate in the Democratic primary over the last four election cycles has been roughly 64% African American. Both Dr. Lichtman and the State's expert, Dr. Gaddie, agreed that current District 24 performs for African Americans because those voters control the primary election. The key to the performance of District 24 is the makeup of the balance of the district. It is a political reality that blacks

and Latinos in Texas vote largely Democratic in the general elections. They do so because, at least in Texas, the Democratic candidates are generally more responsive to the concerns of these minority communities. Under Texas's election scheme, in a Democratic leaning district, the key to a minority group's ability to elect a candidate of its choice on an ongoing basis is found in the group's practical ability to "pull, haul, and trade to find common political ground" in the Democratic primary. The ability to nominate in such districts is tantamount to the ability to elect.

The Supreme Court recently reminded us that "the power to influence the political process is not limited to winning elections." *Ashcroft*, 123 S.Ct. at 2512. *Ashcroft* noted that "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalition districts." *Id.* at 2512-13 (citing David Lublin, *Racial Redistricting and African-American Representation; A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?,"* 93 Am. Pol. Sci. Rev. 183, 185 (1999); Charles Cameron, David Epstein & Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 Am. Pol. Sci. Rev. 794, 808 (1996); C. Swain, *Black Faces, Black Interests* 193-234 (1995); and Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. Rev. 1383 (2001)). If the most effective way to *maximize* minority voting strength is to create more influence or coalition districts, then the most effective way to *minimize* minority voting strength may be to dismantle those districts in

which a minority group has proven successful in its efforts to "pull, haul, and trade to find common political ground."[6]

Ashcroft leaves the state with flexibility to choose the method of creating fewer black majority-minority districts in favor of a greater number of influence or coalition districts. Alternatively, a state enjoys the flexibility to strengthen its existing majority-minority districts to ensure those districts will continue to elect candidates of choice of the minority community. In the Dallas/Fort Worth area, Texas chose neither route. Texas identified District 24, in which the minority community played a decisive role in the nomination and election processes and, because that group was not a literal majority and elected an Anglo Democrat, rearranged a cohesive community of those voters not into new District 12 (where they might have an impact on the general election), but into new District 26. This arrangement has the practical effect of eliminating the minority voters' political influence. But it has a much larger effect: by treating the minority group in this manner, the state action, I fear, will have the effect of destroying the minority group's hope. It is not accidental that, unlike the plan in *Ashcroft*, the present plan had overwhelming opposition from the minority legislators. The law's insistence on a 50% majority shields this move, but at the same time it ignores the political and social

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[6] Recent decisions interpreting *Ashcroft* have held that influence dilution claims are cognizable. The first, *Metts v. Murphy*, *supra*, is cited by the majority. The second is *McNeil v. Legislative Apportionment Commission*, 828 A.2d 840, 853 (N.J. 2003) (holding a provision of New Jersey's state constitution preempted under Section 2 of the Voting Rights Act and noting "we believe that *Georgia v. Ashcroft* supports our conclusion that [influence dilution] claims are permitted").

reality that there is more to participation in the electoral process than winning elections.

It is no answer that the disparate destruction of such coalitions might be tough to identify and even harder to remedy. Our charge is not to decide just the easy cases: it is to apply and, when necessary, enforce the protections of the Voting Rights Act. The question, difficult as it may be to answer, should be whether the treatment of such minority coalitions disproportionately affects those voters' ability to participate in the political process. The remedy need not require the protection inviolate of an old district, but it might require the creation of a more competitive one.

The treatment of the minority coalitions in old District 24 was inconsistent with the purposes of the Voting Rights Act. The evidence demonstrates that District 24 under Plan 1151C and Plan 1000C functioned as a district that fostered our progression to a society that is no longer fixated on race. Under this record, the black voters in old District 24 repeatedly nominated and helped to elect an Anglo congressman with an impeccable record of responsiveness to the minority community. To this end, I view the fact that Congressman Frost has not had a primary opponent to reflect favorably on his record. I would credit the testimony of Mayor Ron Kirk and Senator Royce West. Their testimony concerning how District 24 functions for the African American community is persuasive. Although the State, for § 5 purposes, created a new black opportunity district in the Houston area, this is of little consolation to the minority voters in old District 24, particularly the African American community in Tarrant County. The political influence of that minority community has been diluted, understanding, as did the court in *Ashcroft*, that

power at the polls and participation in the political process is not always measured by mathematical majorities. Given the current state of the law, however, I join the court's judgment denying relief on the plaintiffs' claim that the State violated § 2 by the dismantling of District 24. For the same reasons, I necessarily join the court's judgment denying relief with respect to the plaintiffs' claims that the changes to Districts 1, 2, 4, 9, 10, 11 and 17 resulted in cognizable influence dilution claims.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

SIMON BALDERAS, ET AL.	§	
	§	CIVIL ACTION
vs.	§	
	§	NO. 6:01CV158
STATE OF TEXAS, ET AL.	§	

This Filing Applies to: All Actions

(Filed Nov. 14, 2001)

Before HIGGINBOTHAM, Circuit Judge, HANNAH and WARD, District Judges.

PER CURIAM:

This phase of the redistricting case involves the Texas congressional districts following the 2000 census. After a period of deferral to the State of Texas as mandated in *Growe v. Emison*[1] and the failure of the State to produce a congressional redistricting plan, we are left with the "unwelcome obligation of performing in the legislature's stead."[2] We will describe the course of this litigation and explain the process by which we drew the congressional redistricting plan which we order.[3]

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[1] 507 U.S. 25 (1993).

[2] *Connor v. Finch*, 431 U.S. 407, 415 (1977).

[3] The Congressional Districts imposed by this court's Final Judgment shall bear the number 1151C, which is the next number available for public plans within the Texas Legislative Council's RedAppl 2001 computer program.

I

Voters and various officeholders filed multiple lawsuits in state and federal court challenging the districting of Texas' congressional seats and both houses of the state legislature based on the 2000 census.[4] The federal cases were consolidated into the earliest-filed federal action, *Balderas v. Texas*, No. 6:01-CV-158, before this three-judge court.[5] Pursuant to the Supreme Court's direction in *Growe*, on July 23, 2001 we deferred proceedings in federal court until October 1, 2001. We directed that the trial of any challenge to any state-adopted plan for congressional districts, or of any dispute over an appropriate plan to be adopted if the State adopted no plan, would begin on October 15, 2001. Any trials of the disputes over the districts for the state Senate and House would follow in that order. The record in each trial would rest on the trials which preceded it as well as its own. We prescribed the usual pre-trial tasks. All this was to reduce, if not avoid, any delay in the electoral process and to follow the specific command of the Supreme Court in *Growe*.

On September 12, 2001, the Texas Supreme Court determined that the Travis County trial court had dominant jurisdiction among the state cases to hear the various

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[4] *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.); *Mayfield v. Texas*, Civil No. 6:01-CV-218 (E.D. Tex.); *Manley v. Texas*, Civil No. 6:01-CV-231 (E.D. Tex.); *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County, Tex.); *Cotera v. Perry*, No. GN-101660 (353rd Dist. Ct., Travis County, Tex.); *Connolly v. Perry*, No. GN-102250 (98th Dist. Ct., Travis County, Tex.); *Associated Republicans of Texas v. Cuellar*, No.2001-26894 (281st Dist. Ct., Harris County, Tex.); *Rivas v. Cuellar*, No.2001-33760 (152nd Dist. Ct., Harris County, Tex.).

[5] Other three-judge courts had dismissed prior suits filed prematurely.

plaintiffs' redistricting claims and held that a state trial court in Travis County must decide the districting dispute. The Travis County court commenced trial on September 17, 2001. It heard testimony and arguments from all the parties, concluding trial on September 28, 2001.

On October 1, 2001, at the request of the state trial judge, we extended the deadline for the filing of any congressional redistricting plan to October 3, 2001. On October 3, the state trial court issued a plan, known as 1065C. No provision was made in our October 1 order for the filing of any new plan, although the state trial judge advised that he might modify the plan on or before October 10, 2001. The schedule we had provided did not contemplate major changes in the state court plan filed on October 3. On October 10, 2001, the state court nonetheless issued a new plan, known as 1089C. We immediately delayed the start of any federal trial for one week to October 22 at the request of the parties who pointed to the need for additional time given the substantial differences between the two plans of the state court. On October 19, 2001, however, the Texas Supreme Court vacated the trial court's October 10, 2001 judgment based on a violation of the parties' state constitutional rights and remanded the case to the state trial court.[6] The Texas Supreme Court also concluded that 1065C, the first plan of the state trial court, was not the baseline plan for this court to use, because 1065C was never adopted as a final judgment by the state trial court. The Texas Supreme Court acknowledged that the end result of the state processes left the

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[6] *Perry v. Del Rio*, No. 01-0988, 2001 WL 1285081, at *9 (Tex. Oct. 19, 2001).

federal courts with no choice but to proceed without the benefit of a state plan.[7]

As forecasted by the Texas Supreme Court, we proceeded to trial in Austin, Texas on October 22, 2001, without a state baseline plan in place. This court heard testimony and took evidence on congressional redistricting plans between October 22 and November 1, concluding with final argument on November 2. The parties filed post-trial briefs on November 7, 2001. After reviewing the evidence and the parties' submissions, we now turn to our decision implementing a plan for the redistricting of the Texas congressional districts based on the 2000 census.

II

Federal courts have a limited role in crafting a congressional redistricting plan where the State has failed to implement a plan. The limits are not to be found in the traces of the unconstitutional plan being replaced. "Although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans."[8] Rather, the court must draw a redistricting plan according to "neutral districting factors," including, *inter alia*, compactness, contiguity, and respecting county and municipal boundaries.[9] The 1991 plan as modified in 1996 is conceded by all

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[7] *Id.*

[8] *Upham v. Seamon*, 456 U.S. 37, 39 (1982) (per curiam).

[9] *See Abrams v. Johnson*, 521 U.S. 74, 88, 98 (1997); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

parties to be unconstitutional, made so by changes in population disclosed by the decennial census, if not also for other reasons. In our effort to steer the required neutral course through this political sea, we have been assisted by the many distinguished political scientists who have testified in this case.

Dr. John Alford, Rice University professor of political science, detailed in his trial testimony a process drawing upon principles of district line-drawing that stand politically neutral. We found that process, substantially parallel to our preliminary thinking and that of other courts, to be the most appropriate for our judicial task.

Our decisional process accepted the reality that, as with so many decisional processes, the sequence of decisions is critical. Starting with a blank map of Texas, we first drew in the existing Voting-Rights-Act-protected majority-minority districts. We were persuaded that the next step had to be to locate Districts 31 and 32, the two new Congressional seats allotted to Texas following the 2000 census. As observed by Dr. Alford, the most natural and neutral locator is to place them where the population growth that produced the new additional districts has occurred.[10] It is self-evident that this locator is, across cases, neutral down to the immediate area, if not in the ultimate, precise fit on the ground. Here the new districts' precise landing was virtually dictated by step 1. When we sent the two new districts to the areas of greatest population growth,

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[10] We are not the first court to see the wisdom of this choice. *See, e.g., Johnson v. Miller*, 922 F. Supp. 1556, 1563 (S.D. Ga. 1995) (discussing the decision to place Georgia's additional congressional district in high population growth area near Atlanta), *aff'd sub nom., Abrams v. Johnson*, 521 U.S. 74 (1997).

Dallas County and Harris County, the districts necessarily landed in the northern half of these counties, and, in the case of District 31, continuing over to Williamson County. Their landing was directed by the location of the protected majority-minority districts in southern Dallas and Harris Counties, which could not be disrupted. Use of this neutral guide was further supported by the circumstance that the Texas legislature has previously located new districts in the areas of greatest population growth.[11]

With a large part of the Texas map thus drawn, we looked to general historic locations of districts in the state, such as the districts in the Panhandle and the northeast corner of the state, the north central districts of the Red River area,[12] through the metropolitan districts and the central plains. We then drew in the remaining districts throughout the state, emphasizing compactness, while observing the contiguity requirement.[13] We struggled to follow local political boundaries that historically have defined communities – county and city lines.[14] In the

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[11] *See Bush v. Vera*, 517 U.S. 952, 1003 (1996) (Stevens, J., dissenting) ("Because Texas' growth was concentrated in south Texas and the cities of Dallas and Houston, the state legislature concluded that the new congressional districts should be carved out of existing districts in those areas.").

[12] *Cf. Johnson*, 922 F. Supp. at 1565 (discussing Georgia's tradition of having four "corner districts" in its congressional plans).

[13] *See Good v. Austin*, 800 F. Supp. 557, 563 (E.D. Mich. & W.D. Mich. 1992) ("In addition to serving as a check on gerrymandering compactness 'facilitates political organization, electoral campaigning, and constituent representation.'" (quoting *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring))).

[14] *See Karcher*, 462 U.S. at 758 (Stevens, J., concurring) ("Subdivision boundaries tend to remain stable over time. Residents of political units such as townships, cities, and counties often develop a community of interest, particularly when the subdivision plays an important role in

(Continued on following page)

vernacular, "splits" of counties and cities in our drawing had to be a product of our neutral standards and the demands of population equality. We eschewed an effort to treat old lines as an independent locator, an effort that, in any event, would be frustrated by the population changes in the last decade. Nonetheless, the districts fell to their long-held areas, a natural result of the process we have described, much the same as the map drawn at our request by the State using Dr. Alford's neutral approach.

As we have explained, in our efforts to avoid splitting counties and cities, and in particular "double splits," or simultaneously moving populations in and out of a county between two districts, we also strove for compactness and contiguity. Doing so did much to end most of the below-the-surface "ripples" of the 1991 plan and the myriad of submissions before us. For example, the patently irrational shapes of Districts 5 and 6 under the 1991 plan, widely-cited as the most extreme but successful gerrymandering in the country, are no more.

As a check against the outcome of our neutral principles, we asked if the resulting plan was avoidably detrimental to Members of Congress of either party holding unique, major leadership posts. We ~~looked~~ at three Democrats and three Republicans, consensus members of this limited group, each with substantial leadership positions in the Congress. It was plain that these Members were not harmed in their reelection prospects by this plan and that, indeed, no incumbent was paired with another incumbent

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the provision of governmental services. In addition, legislative districts that do not cross subdivision boundaries are administratively convenient and less likely to confuse the voters." (footnote omitted)).

or significantly harmed by the plan. We thus considered no change in our map in response to this inquiry. Doubtlessly some may see any such weighting as an incumbency factor since congressional leadership so directly correlates with seniority. This view is not without force. Nonetheless, three circumstances must also be considered. First, this correlation is no longer so complete. Second, it does not here offer purchase to one political party over another. And, finally, it reflects a traditional state interest in the power of its congressional delegation distinct from partisan affiliation.

Finally, we checked our plan against the test of general partisan outcome, comparing the number of districts leaning in favor of each party based on prior election results against the percentage breakdown statewide of votes cast for each party in congressional races. This is a traditional last check upon the rationality of any congressional redistricting plan,[15] widely relied-upon by political scientists to test plans, if only in an approximating manner. We found that the plan is likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state. It must be understood that any plan necessarily begins with a Democratic bias due to the preservation of protected majority-minority districts, all of which contain a high percentage of Democratic voters.

[15] *See, e.g., Good*, 800 F. Supp. at 566-67 (using partisan fairness to assess plan drawn according to neutral principles).

III

Various parties urged us to create both African-American and Latino minority districts. These districts are not required by law, as discussed in more detail below, but could be created by the State so long as race was not a predominant reason for doing so. Whether to do so is, however, a quintessentially legislative decision, implicating important policy concerns.[16] We did not avoid creating such a district. At the same time, we did not depart from our neutral factors to draw any district not required by law. To do so would render our effort to keep our thumb off the political scale an illusion.[17]

IV

Finally, to state directly what is implicit in all that we have said: political gerrymandering, a purely partisan exercise, is inappropriate for a federal court drawing a congressional redistricting map.[18] Even at the hands of a legislative body, political gerrymandering is much a bloodfeud, in which revenge is exacted by the majority against its rival. We have left it to the political arena, as we must and wisely should. We do so because our role is limited and not because we see gerrymandering as other

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[16] *See Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. Unit A Feb. 1981).

[17] *Cf. Abrams*, 521 U.S. at 88.

[18] *See Hunt v. Cromartie*, 526 U.S. 541, 551 (1999); *see generally Davis v. Bandemer*, 478 U.S. 109, 117 n.6 (1986) (plurality opinion of White, J.); *cf. Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985) ("Many factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.").

than what it is: an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good.

V

The parties presented competing plans for redistricting the Congressional seats. We have passed by the approach by which these plans were created in favor of the approach we have described, which we found to be mandated by our position as a federal court engaging in our "delicate task with limited legislative guidance."[19]

Several parties raise Voting Rights Act arguments in support of their preferred plans. In drawing our plan, we have endeavored to ensure that the plan complies with the goals of sections 2[20] and 5[21] of the Voting Rights Act.[22]

Our plan works no retrogression. We have maintained intact the existing districts, and, to the extent the boundaries have changed, as we "zeroed out" the plan, the minority populations have been either enhanced or not diminished in any meaningful way (i.e., by mere fractions of percentages). Thus, although the minority populations in Districts 15, 16, and 30 represent a slightly smaller, but still overwhelming, percentage of the total populations of those districts as compared with the baseline 1991 plan as modified in 1996, we find that these changes do not result in "a retrogression in the position of racial minorities with

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[19] *Abrams*, 521 U.S. at 101.

[20] 42 U.S.C. § 1973.

[21] 42 U.S.C. § 1973c.

[22] *See Abrams*, 521 U.S. at 90, 96.

respect to their effective exercise of the electoral franchise."[23]

The Balderas plaintiffs argue that the congressional plan must contain seven Latino registration majority districts, within nine Latino voting age majority districts, to avoid a section 2 violation. The Martinez intervenors specifically argue for a Latino opportunity district in Dallas County to maintain compliance with section 2. Many parties, including the Texas Coalition of Black Democrats, argue for an African-American opportunity district, generally labeled District 25, in Fort Bend and Harris Counties.

The Latino and African-American plaintiffs thus present competing positions, reflecting a political reality that they are competitors in the political process.[24] This competition finds expression in an absence of cohesive voting between Latinos and African-Americans at the point in which it is meaningfully measured, the Democratic primaries.

We find that the plaintiffs have failed to prove that vote dilution will occur in violation of section 2 of the Voting Rights Act in the absence of seven Latino citizenship majority congressional districts or an African-American opportunity district, proposed District 25, in Fort Bend and Harris Counties. The evidence did not persuade us that either Latino or African-American voting

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[23] *Beer v. United States*, 425 U.S. 130, 141 (1976); *see also Abrams*, 521 U.S. at 95; *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 478 (1997).

[24] Several political scientists alluded to this political reality in their testimony.

age populations are sufficiently numerous to form voting age population majorities in effective districts.[25] The plaintiffs have also not proved that Latinos and African-Americans vote cohesively as required by *Thornburg v. Gingles*[26] so as to constitute a majority in a single-member district.[27]

Looking first to the proposed African-American opportunity district, the Texas Coalition of Black Democrats has conceded that the evidence showed that African-Americans would not be an absolute majority of citizen voting age population in the proposed District 25. Again, the plaintiffs were unable to prove cohesive voting between Latinos and African-Americans sufficient to compel the drawing of a district in Fort Bend and Harris Counties.[28] The overwhelming evidence found to be persuasive was to the contrary. The matter of creating such a permissive district is one for the legislature.[29] As we have explained, such an effort would require that we abandon our quest for neutrality in favor of a raw political choice. We offer no opinion as to the wisdom of an appropriate body doing so. Such arranging of voting presents a large and complex decision with profound social and political consequences. The Congress has by its enactment of voting rights laws constrained the political process and given the

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[25] *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-53 (5th Cir. 1999).

[26] 478 U.S. 30, 50-51 (1986).

[27] *See Valdespino*, 168 F.3d at 852-53.

[28] *See Growe*, 507 U.S. at 41.

[29] *See Johnson*, 922 F. Supp. at 1567 ("Since political considerations pervade the redistricting task, the Court feels that any permanent footprint left on Georgia's political landscape . . . should be left to those elected to make such decisions.").

courts a role – to the extent of those constraints. We have no warrant to impose our vision of "proper" restraints upon the political process beyond the constraints imposed by the Constitution or the Voting Rights Act. The Supreme Court put it succinctly in *Growe*, stating that, where there has been no showing establishing the "three *Gingles* prerequisites," then under section 2 of the Voting Rights Act "there neither has been a wrong nor can be a remedy."[30] A month later, the Court stated even more directly that, "[o]f course, the federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law."[31]

In sum, these arguments so ably presented by Morris Overstreet, African-American attorney and former state official and candidate for elective office, and others are directed to the wrong forum, however much we may personally admire the arguments. It bears mention that our plan has hardly left a bleak terrain. In District 25 of our plan, the combined African-American and Latino voting age population increased to a 52.3 majority. In the practical world, this percentage will dominate the Democratic primary in a district that has consistently elected a Democratic congressman. This is, then, in a real sense, a minority district produced by our process that enhances the elective prospects of a minority, albeit not wholly the district sought.

As for the proposed Latino opportunity districts, the evidence shows that the Latino population is not sufficiently compact or numerous to support another, effective

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[30] 507 U.S. at 41.

[31] *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993).

majority Latino citizenship district in Texas, in Dallas County or in South Texas.[32] We find that, under the totality of the circumstances, the failure to create seven such districts will not prevent full and equal Latino participation in the political process. It bears mention that our insistence upon compactness has increased the Latino force in District 24, a result supported by Congresswoman Eddie Bernice Johnson in her testimony at trial.

The Valdez-Cox plaintiffs also urge that Webb and Hidalgo Counties be left whole. We heard powerful arguments from the witness stand and counsel in opposition to a splitting of Hidalgo County in South Texas, and our neutral standards stood against such a county split. That standard was ultimately overriden as to Hidalgo County by the mandate of population equality under the principle of one-man, one-vote, and the existence of surrounding protected majority-minority districts. It is an ugly fact that the law's insistence on absolute population equality in court-drawn plans has the perverse effect of splitting counties and cities, when a tolerance of greater deviation would not demand such undesirable divisions. The split here of Hidalgo County is a fit example.[33] Webb County was not caught in this squeeze and remains wholly intact in District 23.

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[32] *See Growe*, 507 U.S. at 39-40; *Gingles*, 478 U.S. at 50-51; *NAACP v. Fordice*, 252 F.3d 361, 365-67 (5th Cir. 2001).

[33] We endeavored to and did respect the municipal boundaries of McAllen, a major population center of Hidalgo County.

VI

There being no reason for delay, we direct entry of final judgment in this case pursuant to Federal Rule of Civil Procedure 54(b).

So **ordered** and **signed** this 14th day of November, 2001.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT JUDGE

/s/ John Hannah, Jr.
JOHN HANNAH, JR.
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRENCHIE HENDERSON, ET AL.	§	CIVIL ACTION
Vs.	§	NO. 2:03-CV-354
RICK PERRY, ET AL.	§	Consolidated

FINAL JUDGMENT

(Filed Jun. 9, 2005)

For the reasons expressed in the court's opinion filed contemporaneously herewith, the court renders judgment in favor of the defendants on all claims. All claims asserted are dismissed with prejudice.

So **ORDERED** and **SIGNED** this 9th day of June, 2005.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
TJW
UNITED STATES CIRCUIT JUDGE

/s/ John H. Rosenthal
JOHN H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

/s/ T. John Ward
T. JOHN WARD
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

FRENCHIE HENDERSON, *et al.*	§	
	§	
Plaintiffs,	§	Civil Action
	§	No. 2:03-CV-354
vs.	§	(Consolidated)
	§	
RICK PERRY, *et al.*	§	
	§	
Defendants.	§	

NOTICE OF APPEAL

(Filed 06/25/2005)

Notice is hereby given that Plaintiff-Intervenors Travis County and the City of Austin, Texas, hereby appeal the decision and final judgment of June 9, 2005, by the three judge court in this case to the Supreme Court of the United States. The appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS MARSHALL DIVISION

FRENCHIE HENDERSON, ET AL.	§	CIVIL ACTION NO. 2:03-CV-354
vs.	§	Consolidated
RICK PERRY, ET AL.	§	

NOTICE OF APPEAL

NOTICE is hereby given that plaintiffs Eddie Jackson, Barbara Marshall, Gertrude "Traci" Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, J.B. Mayfield, Roy Stanley, Phyllis Cottle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T. Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R. Delco, Gustavo Luis "Gus" Garcia, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J. Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willis Wooten, Ana Yañez-Correa, Mike Zuniga, Jr., and Plaintiff-Intervenors Gene Green, Chris Bell, Nick Lampson, Lester Bellow, Homer Guillory, John Bland, and Reverend Wille Davis hereby APPEAL the June 9, 2005, decision and final judgment of the three judge court in this case to the Supreme Court of the United States. This appeal is taken pursuant to 28 U.S.C. §1253.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2005, in addition to placing this Notice in the Court's Electronic Case Filing System, I also served a copy of the foregoing Notice of Appeal on all counsel of record by placing a true and correct copy of the same, in the United States mail, first class, postage prepaid.

/s/ Otis Carroll
Otis Carroll

Supreme Court, U.S.
FILED
JAN 10 2006
OFFICE OF THE CLERK

Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

JOINT APPENDIX
Volume I of II

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05-254, JURISDICTIONAL STATEMENT FILED AUGUST 24, 2005
05-276, JURISDICTIONAL STATEMENT FILED AUGUST 31, 2005
05-439, JURISDICTIONAL STATEMENT FILED OCTOBER 3, 2005
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Date Filed	Tab	Description
10/12/2003	1	Original Complaint filed. Cause: 28:1983 Civil Rights
12/03/2003	98	Trial brief by LULAC, Webb County TX, and Cameron County Texas
12/03/2003	99	Trial brief by Charles Soechting in 2:03-cv-00354
12/03/2003	100	Trial brief by Travis, County of in 2:03-cv-00354, Austin, City of in 2:03-cv-00354
12/03/2003	107	Revised Trial brief by "State Defendants" in 2:03-cv-00354
12/03/2003	108	Trial brief by GI Forum of Texas in 2:03-cv-00354
12/03/2003	115	Trial brief by "Dem Congress Intv"and "Jackson Plaintiffs"
12/15/2003	126	Transcript of Bench Trial 12/11/03 1:00 P.M. in Austin TX before Judge Higginsbothamn T John Ward and Lee H Rosenthal filed . Court Reporter: Susan Simmons

Date Filed	Tab	Description
12/15/2003	157	Page & Line designation of Mr Jim Ellis' deposition by Walter Session in 2:03-cv-00354
12/16/2003	184	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/15/03 at 8:30 a.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.
12/16/2003	185	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/15/03 at 1:00 p.m. before Judge Higginbotham Ward Rosenthal. Court Reporter: Susan Simmons.
12/17/2003	186	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/16/03 at 8:30 a.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.
12/17/2003	187	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/16/03 at 1:00 p.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.
12/17/2003	189	TRANSCRIPT of Bench Trial Proceedingsin AUSTIN TX held on 12/17/03 at 1:00 p.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.

Date Filed	Tab	Description
12/18/2003	188	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/17/03 at 8:30 a.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.
12/19/2003	190	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/18/03 at 8:30 a.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.
12/19/2003	191	TRANSCRIPT of Bench Trial Proceedings held in AUSTIN TX on 12/18/03 at 1:00 p.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons
12/19/2003	192	TRANSCRIPT of Bench Trial Proceedings in AUSTIN TX held on 12/19/03 at 8:00 a.m. before Judge Higginbotham Ward & Rosenthal. Court Reporter: Susan Simmons.
12/19/2003	193	TRANSCRIPT of Bench Trial held on 12/19/03 in Austin before Judge Ward; Judge Rosenthal; Circuit Judge Higginbotham. Court Reporter: Susan Simmons. 102 pages (not scanned - original document in Clerk's Office, Marshall TX)
12/20/2003	131	POST TRIAL Brief filed by Travis, County of in 2:03-cv-00354, Austin, City of in 2:03-cv-00354

Date Filed	Tab	Description
12/22/2003	134	POST-TRIAL SUBMISSION by Charles Soechting Chairman of the Texas Democratic Party in 2:03-cv-00354
12/22/2003	135	POST TRIAL Brief filed by "State Defendants" in 2:03-cv-00354
12/22/2003	136	FILED IN TYLER POST TRIAL Brief filed by "Dem Congress Intv" in 2:03-cv-00354, Jackson Plaintiffs in 2:03-cv-00354
12/23/2003	137	Post Trial Brief filed by TX-NAACP in 2:03-cv-00354
12/23/2003	139	Post Trial Brief filed by GI Forum of Texas in 2:03-cv-00354
12/29/2003	141	POST TRIAL Brief filed by LULAC in 2:03-cv-00354
01/06/2004	162	Memorandum Opinion before Higginbotham, Cir Judge, and Ward and Rosenthal, district judges: For the reasons set forth herein, we deny all relief requested by plaintiffs; Judgment will be entered for defendants. Ward, J., concurring in part & dissenting in part copy faxed/mailed to all attys & Judges Note: See Document #162 in Lead Case 2:03cv354 (ktd) Modified on 01/06/2004

Date Filed	Tab	Description
01/07/2004	163	Notice of appeal to Supreme Court by TX Democratic Party, Jackson Plaintiffs , Mayfield Plaintiffs , Manley Plaintiffs (Eddie Jackson, Barbara Marshall, Gertrude "Traci" Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, JB Mayfield, Roy Stanley, Phillis Cotle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R Delco, Gustavo Luis "Gus" Garcia, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willia Wooten, Ana Yanez-Correa, Mike Zuniga Jr, and plaintiff-intervenors, Gene Green, Chris Bell, Nick Lampson, Leser Bellow, Homer Guillory, John Bland, And Rev Wille Davis) of [162-2] order Fee paid (copies to attys & judges 1/7/04) (ktd) Modified on 01/09/2004

Date Filed	Tab	Description
01/07/2004	166	ORDER denying [164-1] motion "emergency" to stay the judgment pending appeal in 2:03-cv-00354, 6:01-cv-00158 (signed by Judge T. J. Ward Higginbotham & Rosenthal) cc: attys faxed 1/7/03 (poa) Modified on 01/07/2004
01/07/2004	168	Notice of appeal to supreme court by "Cherokee Cnty pla" of [162-2] order . Fee Status: not paid cc: attys & judges fax 1/7/04
01/08/2004	170	ORDER denying [169-1] motion to stay judgment pending appeal (signed by Judge T. J. Ward 1/8/04 cc: attys & 3-judge panel 1/8/04)
01/08/2004	171	ORDER denying [167-1] motion "emergency" to stay judgment pending appeal (signed by Judge T. J. Ward 1/8/04 cc: attys & 3-judge panel
01/09/2004	173	Notice of appeal to Supreme Court by Travis, County of and Austin, City of of [162-2] order . Fee Status: not paid (copies faxed/mailed to all attorneys and judges)

Date Filed	Tab	Description
01/15/2004	174	Judgment. For the reasons expressed in the ct's opinion dated 1/6/04, it is ORDERED that the plaintiffs take nothing by way of this suit. The ct renders judgment in favor of the defendants on all claims asserted against them in these consolidated redistricting cases (signed by Judge T. J. Ward; Patrick E Higginbotham & Lee H Rosenthal 1/15/04 cc: attys & judges fx/mld 1/15/04)
01/21/2004	181	NOTICE OF APPEAL by League of United Latin American Citizens-Statewide. Filing fee not paid.
01/27/2004	176	Notice of appeal by GI Forum of Texas, "Balderas' pla", LULAC, TX Lulac Dist 7 & 15, Eli Romero of [162-2] order . Fee Status: 300.00 Receipt #101998
02/17/2004	180	TRANSCRIPT of Bench Trial Proceedings held on 12/12/03 @ 1:00 in Austin TX before Judge Ward Higginbotham & Rosenthal. Court Reporter: Susan Simmons. (poa,) (Entered: 02/17/2004)

Date Filed	Tab	Description
10/18/2004	195	ORDER REOPENING CASE. The consolidated cases are on REMAND from the US Supreme Court for further consideration; the court sua sponte ORDERS the parties to submit supplement briefing in accordance with the schedule set forth herein; opening briefs by 12/6/04, together with any requests to supplement the record; simultaneously file response briefs by 12/30/04; briefs not to exceed 50 pages in length. Signed by District Judge T. John Ward; Lee H. Rosenthal, US District Judge; and Patrick E Higginbotham, US Circuit Judge on 10/18/04.
12/02/2004	198	SUPREME COURT OF THE UNITED STATES JUDGMENT as to 172 Notice of Appeal filed by Sheila Jackson Lee, Eddie Bernice Johnson, 176 Notice of Appeal filed by GI Forum of Texas, "Balderas' pla", League of United Latin American Citizens-Statewide, Texas LULAC Districts 7 and 15, Eli Romero, 163 Notice of Appeal filed by Texas Democratic Party, Jackson Plaintiffs, Mayfield Plaintiffs, Manley Plaintiffs, 173 Notice of Appeal filed by County of Travis, Texas, City of Austin TX. It is ordered that the motion of petr for

Date Filed	Tab	Description
		continued leave to proceed ifp in 03-9644 is GRANTED; the JUDGMENT is VACATED and the cases REMANDED to the USDC for further consideration. Appellants Eddie Jackson etal; American GI Forum of TX etal; Congresswom Sheila Jackson Lee and Congresswoman Eddie Bernice Johnson; and Travis County TX etal recover from Rick Perry, Governor of TX etal the sum of $1,200.00 for costs herein expended. Dated 10/18/04 Clerk's Costs: $1,200.00 ($300.00 to each set of named appellants)
12/06/2004	200	BRIEF filed *by Jackson plaintiffs and* by Democratic Congressional Intervenors. (Attachments: # 1 Affidavit of Dr. John Alford)(Hebert, J)
12/06/2004	201	MOTION for leave to file Amicus Curiae Brief by University Professors Concerned about Equal Representation for Equal Numbers of People.
12/06/2004	203	BRIEF filed *State Defendants' Opening Brief on Remand* by "State Defendants". (Taylor, William)

Date Filed	Tab	Description
12/06/2004	205	BRIEF filed *Remand Brief* by Texas State Conference of NAACP Branches. (Bledsoe, Gary)
12/06/2004	207	TRIAL BRIEF *Initial Brief on Remand* by County of Travis, Texas. (Hicks, Renea)
12/06/2004	208	TRIAL BRIEF *ON REMAND* by American GI Forum of Texas. (Attachments: # 1 Exhibit Exhibit B)(Perales, Nina)
01/14/2005	236	BRIEF *Reply Brief on Remand* filed by County of Travis, Texas. (Hicks, Renea) Modified on 1/14/2005
01/14/2005	237	Appellant's REPLY BRIEF by University Professors Concerned about Equal Representation for Equal Numbers of People. (Bickerstaff, R)
01/14/2005	240	BRIEF filed *in Reply by Democratic Congressional Intervenors and* by "Jackson Plaintiffs". (Hebert, J)
01/14/2005	241	BRIEF filed *State Defendants' Response Brief on Remand* by "State Defendants". (Attachments: # 1 Continuation of Brief)(Taylor, William)

Date Filed	Tab	Description
01/14/2005	243	BRIEF filed *in Response to State Defendants' Brief* by Texas State Conference of NAACP Branches. (Notzon, Robert)
01/18/2005	244	BRIEF filed *Supplemental Brief* by League of United Latin American Citizens-Statewide. (Rios, Rolando)
01/24/2005	248	BRIEF filed *The Post-Hearing Brief of Amicus University Professors in Response to Questions from the Court* by University Professors Concerned about Equal Representation for Equal Numbers of People. (Bickerstaff, R)
02/09/2005	253	TRANSCRIPT of Arguments held on 1/21/05 at 9:00 a.m. in Dallas TX before the Honorable Patrick Higginbotham, Honorable T John Ward,and Honorable Lee H Rosenthal. Court Reporter: Susan Simmonsn
06/09/2005	266	MEMORANDUM OPINION before Higginbotham, Cir Judge, and Ward and Rosenthal, district judges: For the reasons set forth herein, we deny all relief requested by pltf's. Judgment will be entered for defendants. Signed by Judge T. John Ward on 6/9/05.

Date Filed	Tab	Description
06/09/2005	267	FINAL JUDGMENT - For the reasons expressed in the court's opinion filed contemporaneously herewith, the court renders judgment in favor of the defendants on all claims. All claims asserted are dismissed with prejudice. Signed by Judge T. John Ward on 6/9/05.
06/25/2005	271	NOTICE by City of Austin TX *Notice of Appeal by Travis County and City of Austin* (Hicks, Renea)
07/06/2005	276	NOTICE OF APPEAL as to 267 Final Judgment, by all pla's. (fee will be overnighted)
08/02/2005	280	NOTICE OF APPEAL to the Supreme Court as to 266 Memorandum & Opinion, 267 Judgment, by American GI Forum of Texas. (ehs)
09/06/2005	283	US Supreme Court Case Number 05-276 for 280 Notice of Appeal filed by American GI Forum of Texas,. (ehs,)

REPORT OF JOHN R. ALFORD ON TEXAS CONGRESSIONAL REDISTRICTING

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Introduction

I have been retained as an expert to provide an analysis relevant to the newly adopted Texas congressional district plan. I am a tenured associate professor of political science at Rice University. At Rice, I have taught courses on redistricting, elections, political representation, voting behavior, and statistical methods at both the undergraduate and graduate level. Over the last fifteen years, I have worked with numerous local governments on districting plans and on Voting Rights Act pre-clearance issues. I have previously provided expert reports and/or testified as an expert witness in voting rights and statistical issues in a variety of court cases, working for the U.S. Attorney in Houston, the Texas Attorney General, a U.S. Congressman, and various cities and school districts. In the most recent round of redistricting, I was retained as an expert to provide advice to the Texas Attorney General in his role as Chair of the Legislative Redistricting Board. I subsequently served as the expert for the State of Texas in the state and federal litigation involving the 2001 redistricting for U.S. Congress, the Texas Senate, the Texas House of Representatives, and the Texas Board of Education. I also have worked as an expert in redistricting and voting rights cases in New Mexico, Mississippi, Wisconsin, Florida, and Alabama. The details of my academic background and work as an expert are covered in the attached vita (Appendix A). My rate of compensation is $300 per hour.

The short time available to prepare this analysis necessitated writing this report while continuing my analysis. I will supplement my report with any additional work as it is completed. I also expect to respond with appropriate additional analysis where needed in response to other expert reports as they become available.

Summary of Key Conclusions

This report covers three areas in which the new congressional map for Texas raises clear concerns:

- **Mid-Decade Redistricting** - Replacing a legal existing congressional map mid-decade disrupts the ten years of representational stability that the Founders settled on, and that the Constitution specifies, as the appropriate trade-off between proportional accuracy and stability of representational arrangements inherent in geographical representation systems. Further, weakening the protective barrier provided by a decade long delay between the redistricting of the state legislature and the subsequent redrawing of congressional lines in the state legislatures that were shaped by the earlier state redistricting, opens the entire redistricting process, state and congressional, to undue national and political party influence. Far from being a proper exercise of state autonomy, mid-decade redistricting is both a result of, and an invitation to, national control of state redistricting decisions.

- **Racial Gerrymandering** – Four districts, the 15th, the 25th, the 28th, and the 29th in the new plan, reflect an excessive attention to ethnicity in their geographical configuration. Further, differential treatment of incumbents based on their ethnicity is apparent and openly admitted in two other districts (the 23rd and the 29th).

- **Partisan Gerrymandering** – Taken as a whole, the new plan is in totality an excessive

effort to dictate a partisan statewide outcome – with twenty-two Republican seats and ten Democratic seats. This is apparent in the characteristics of the plan and the process of its adoption, and is openly admitted by those responsible for it. The plan packs and cracks Democratic voters to maximize and lock in a Republican seat advantage, with little regard for other districting concerns, including the tradition of not replacing existing legal plans in mid-decade. This packing and cracking of Democratic voters is accompanied by a highly partisan pattern of needless pairings of incumbents and disproportionate disruption of the district population cores of Democratic incumbents. The result is a plan that is needlessly disruptive of the relationship between voters and their representatives, as well as both needlessly biased and needlessly unresponsive, as comparison to the existing plan makes abundantly clear.

Mid-Decade Redistricting

This is a most unusual congressional redistricting in that the new map, Plan 1374C, is a complete, and substantially reconfigured, replacement to an existing map, Plan 1151C, that is itself new, having been used for only one round of elections. Moreover, the existing plan is a legal one. The legality of the existing plan was challenged on Voting Rights Act grounds, but the plan was successfully defended by the state, and the state itself has not challenged the legality of the plan in court or elsewhere.

The U. S. Constitution established a ten-year interval for reapportionment of House districts among the states and subsequent redistricting within each state. While initially

this provided the opportunity for states to redraw congressional lines at ten-year intervals, it was not until the advent of active court enforcement of constitutional equal population requirements that states were actually compelled by the publication of new census counts to redraw congressional districts at ten-year intervals. The choice of a constitutionally fixed ten-year interval between reapportionments reflects a difficult tradeoff between the desire for equality of population and the desire to reduce the costs to citizens in terms of the disruption of representation inherent in reordering representational geography.

The accuracy of the population basis for both the apportionment and the new equal-sized districts drawn as a result of the apportionment begins to erode before the first elections are held. With each passing year, the existing apportionment, and the existing district lines, trend further away from equality, given the realities of shifting relative populations. In a geographically based system of representation this deterioration in representational equality must either be ignored, as it is in our Senate, or it must be periodically rebalanced, as it is for House elections. While constant readjustment is at least theoretically possible, it undermines the stability of representational relationships that is one of the salient reasons for choosing a geographic system in the first place. This distinction is clearest when we look at systems that combine geographic single-member districts with at-large representation, as is the case in many "mixed" city council election systems, or in a mixed parliament system like the German Bundestag. At-large representation tends toward highlighting broader policy concerns, while districted representation tends toward more localized and "casework" forms of representation. Even though you are represented by both your own district council member and the at-large members, you are more likely to view the district member as "your" representative. In any case, if the choice

is for fixed geographic representation with periodic readjustment, as it was for House elections, then some time interval must be chosen. There will always be tension between the representational stability of a longer period and the representational equality of a shorter period.

One could debate whether ten years was the best choice or not, but there is no debate that ten years is the tradeoff that the Framers settled on. To argue that this ten-year interval applies only to reapportionment, and not to the redistricting that it occasions, ignores the fact that most of the disruption to representation comes not from reapportionment itself, but instead from the subsequent redrawing of district lines. Moreover, this line of thinking treats the redrawing of House districts as an independent state power, rather than one that devolves from the mandated congressional responsibility to reapportion once ever decade, and the subsidiary provisions for a state role in implementing that process. Authorizing the states to set the "times, places and manner of holding elections" hardly qualifies as a reserved state power. It is followed immediately by a grant to the Congress of the power to completely override the states' authority, as Congress can "at any time by law make or alter such regulations." The fact that Congress has the complete authority to override any state government role in the selection of House members is made even clearer by the explicit note that the only exception is "as to the places of choosing Senators." Thus, a concern for federalism is simply not implicated here. The Constitution settles the national–state question by granting ultimate control over the rules of House elections to the national government. The state government role is permissive, and one might note also necessitated initially by the obvious fact that Congress can't establish these procedures for House elections until there is a House in place. The Framers chose not to specify the voluminous details of the election mechanisms in the

Constitution itself (as was done for the much simpler initial apportionment), and this necessitated a role for some other, already existing, government in getting the House election process off the ground. In that initial startup, and in all the decades that follow, the state role remains one of performing an administrative task that the Congress either initially couldn't do (because it didn't exist), or subsequently ought not to do (because of the inherent conflict of interest in self redistricting).

A state seeking to redistrict mid-decade could advance one obvious argument for why this should be allowed given the particular circumstances of the situation. The state could argue that there had not yet been any legal redistricting plan drawn for the state following the most recent reapportionment. This would normally arise if an existing plan was found to be, or could be argued to be, illegal or unconstitutional. Where an illegal plan must be replaced in mid-decade, allowing the state the first opportunity to draw the new plan *in a timely manner* imposes no necessary disruption beyond that inherent in the fact that someone must redraw the illegal existing plan. Even here, one can envision a situation in which a court might allow an existing legally flawed plan to be used for the last election contest of a decade, rather than impose the disruption of two successive redistrictings in two years.

Where a court-drawn plan was put in place following a state default, as it was here, the only issue is whether the federal courts were implicated in the failure of the state to draw a new map. If the state was given a full opportunity to act, but chose not to do so, then it effectively relinquished its opportunity to participate in the once-a-decade implementation of the national rebalancing of popular representation. In the present case, the events leave little room for alternative interpretation. The state legislature gave

little attention or priority to redistricting in its regular session in 2001. The Texas legislature is responsible in the first session after a census for redistricting related to four separate bodies: the Texas House, the Texas Senate, the Texas State Board of Education, and the U.S. House districts within Texas. The legislature did not pass a plan for a single one of these four bodies. When the legislature adjourned without passing any plans it shifted responsibility for drawing the state House and Senate districts to the Legislative Redistricting Board. This had the effect of moving these state House and Senate maps from a divided legislature to a Legislative Redistricting Board with a four-to-one Republican majority.

The limited authority of the Legislative Redistricting Board did not allow them to draw lines for U.S. House districts or State Board of Education districts. These lines could only be drawn by the state legislature, and only the Governor could call the legislature back into special session. Gov. Perry declined to do so, though subsequent events clearly demonstrate that it is certainly possible for a governor, in this case the same Gov. Perry, to do so repeatedly if he is so inclined.

This decision by the state to cede its redistricting opportunity for both the U.S. House districts and the State Board of Education districts was not in any way coerced by the federal courts, or even occasioned by extraordinary circumstances. There was no delay in the provision of census data to the state, no policy emergency that preempted state attention to redistricting, and no other external condition that interfered with the state's opportunity to dictate the form of these district plans. In fact, the state did not even run out of time, as one might expect in a deadlock scenario where one or both sides seek to delay redistricting until it is no longer feasible. The state simply quit, and turned the process

over to the courts. Even at this stage, deference to the state continued, as a state court attempted to craft a congressional plan, while the federal court stood aside. Ultimately the state court did not succeed in this task, but it is important to remember that this was not a battle that pitted the State of Texas against the Federal Courts. The State of Texas actively opposed the final state court plan.

Thus there were two separate opportunities for the state to fashion its own congressional plan – first a state legislative process, and then a state court process. In both cases the failure to act on these opportunities reflects choices made by or within the state government, not an imposition of authority by the Federal Courts. If anything, the state encouraged and welcomed federal court action as a means to delay for two years any serious attempt at drawing a plan in the legislature.

A less recognized, but very important issue, of federalism is imbedded in the natural delay imposed by once-a-decade redistricting on the link between changes to the state legislature caused by redistricting and changes in the congressional delegation caused by its redistricting. The fact that congressional redistricting must be completed by a legislature that is itself a reflection of a previous decade's state-level redistricting maps is important. There is natural national partisan interest in state redistricting since the party advantaged in the state in the current round will be better situated to influencing congressional (national) redistricting a decade down the road. This interest is dampened, however, by the lack of immediate reward. Ten years is a very long time for politicians, party activists, and donors to plan ahead. Interest is also dampened by the uncertainty inherent in drawing lines now to influence elections that are still years away. All of this allows states to attend to their own state-level redistricting with at least some degree of insulation

from national parties, partisans, and politics. The same cannot be said if states are allowed to break the link that requires simultaneous redistricting of the state legislature and the Congress. If legislative redistricting in the year after each census begets congressional redistricting two years later, national party politics increasingly will dominate and corrupt state-legislative redistricting.

The recent experience in Texas is a stark illustration of the unintended erosion of state autonomy that will be commonplace if mid-decade redistricting is endorsed. Far from insuring that state government has an appropriate influence on national districting, it will insure only that national districting has an ever more pervasive influence on the drawing of state-legislative districts. National political parties, national fund raising, and national leaders played an unprecedented role in shaping the new maps for the Texas House and Senate. Once the maps were in place, national political parties, national fund raising, and national leaders played an unprecedented role in recruiting candidates, funding local campaigns, and attempting to shape voter opinions and turnout in state-legislative elections. All of this in an effort to mold the political landscape for congressional redistricting, and bend the redistricting will of state officeholders to the preferences of national party officials and officeholders.

Consider one telling example: Lt. Governor Ratliff, a Republican, and one of the most widely respected members of the Texas Senate, ought to have been the key player in this round of redistricting in Texas. Texas has a weak-governor form of government, and the real power in the state resides with the Lt. Governor. Early in the state redistricting process however, Gov. Ratliff abandoned his plans to run for popular election as Lt. Governor (he had been chosen by the Senate to replace Gov. Perry when Perry moved up from Lt.

Governor to Governor) in large part because he was uncomfortable with letting national party priorities compete with his sense of what was best for Texas in the redistricting process. By the end of the congressional map-drawing process, Gov. Ratliff, now back in his old role as a state senator, had quit the capital in disgust and was back home, strongly inclined to resign from state government. His successor as Lt. Governor, Lt. Gov. Dewhurst, perhaps the most gifted leader in the group of new Republicans in Austin, had proved unable to control either the redistricting process or its impact on the Texas Senate. In the end it was not Lt. Gov. Ratliff, or Lt. Gov. Dewhurst, or even Gov. Perry who brokered the deal that finally produced the new Texas congressional map. It was Congressman DeLay. An elected federal official and a leader in the national legislature came to Austin and did what the state leadership either wouldn't or couldn't do.

What this anecdote illustrates is true of this decade's Texas redistricting experience in general. The potential to redraw the congressional lines *after* reaping the political rewards of redrawing the state-legislative lines is not a safeguarding of state influence in redistricting. Quite the contrary, it in fact opens up the congressional redistricting process, and indeed even the state's own state-legislative redistricting process-to what can be overwhelming national influence.

This is not the first time that an intended state power has ended up being wagged by its national tail. The original constitutional grant of power to state legislatures to select U.S. Senators led to similar problems in many states. Recall that the most famous election debates in American political history took place between two candidates for Senator in Illinois some 60 years before the advent of direct Senate elections. Why were Lincoln and Douglas touring the state

giving public speeches instead of addressing the state legislature? Because they were stumping for candidates to the state legislature, and the candidates' pledge to vote for a particular Senate candidate had become a powerful force in shaping the makeup of the state legislature, and pulled state-legislative elections directly into the national sectional issues that were diving the nation. By the time the Constitution was amended to remove from the state governments the power to select Senators, 29 states had already moved toward some modified form of popular election, in part to keep the selection of U.S. Senators from running roughshod over state issues. Mid-decade redistricting at the congressional level likewise has the potential to damage state government today.

Racial Gerrymandering

A racial gerrymander is reflected by a district configuration in which regard for traditional districting principles (such as compactness, contiguity, keeping political subdivisions whole, protecting communities of interest, and avoiding needless pairings) is subsumed by an overriding attention to race or ethnicity. This excessive attention to race or ethnicity is evident in two distinct aspects of the new map. First, several of the districts have a physical configuration that supports this conclusion. Second, the explicit focus on the race or ethnicity of incumbents in some districts also provides evidence of this excessive attention.

Ethnicity and the Physical Configuration of Districts

Three districts, the 15th, 25th, and 28th, in the new plan (throughout the discussion below reference to the "new plan" is to Plan 1374C, and reference to the "existing plan" is to 1151C, as documented by the Texas Legislative Council) stand out as racial gerrymanders. All are Hispanic majority districts running in narrow north/south strips from the lower Rio Grande area up into central Texas. These three districts

are anchored to the south in territory that, in the existing map, is largely in Districts 15 and 28. To get three Hispanic districts out of two existing districts, the three new districts had to be thin and long, and hence push much further north, and some new Hispanic population had to be included from the northern reaches as well.

The two most widely used measures of district compactness, and the two that are provided to redistricters in Texas by the Texas Legislative Council to help them in assessing compactness when they are comparing potential plans, are "smallest circumscribing circle" and "perimeter to area ratio." The "smallest circumscribing circle" score measures non-compactness in the stretched out sense. Long, narrow districts get high (worse) scores on this measure, while districts that are closer to a circle in shape (the most compact form) get lower (better) scores. The "perimeter to area" ratio measures non-compactness is the sense of how irregular the boundaries of a district are, regardless of how stretched out or bunched together a district might be. Districts with jagged irregular boundary lines get high (worse) scores on this measure, while districts with smooth, regular outlines get lower (better) scores. For either measure, a perfect score (for a smooth, circular district) would be 1.0. In addition to these numerical indications, a visual examination of the shape of the district is helpful, and "silhouette" maps of the 15th, 25th, 28th, and 29th districts (Maps 1, 2, 3, and 4 respectively) have been attached to facilitate this.

District 25 has the worst "smallest circle" compactness measure in Plan 1374C at 8.5, a value substantially higher than the worst smallest circle measure in the existing plan (of 5.0 for District 15). The "perimeter to area" compactness measure for District 25 is also high at 9.6, ranking it 30th out of the 32 districts on this measure (or third

worst). Most (77%) of the total population and most (78%) of the minority population of the district are located at the two extremes of the district, with the narrow, lightly populated territory serving largely to provide a physical connection for a concentration of Hispanic population in Travis County at the northern end of the district and a concentration of Hispanic population in Hidalgo and Starr Counties at the southern end (see the density shading by block group in attached Map 5 for a visual illustration). Nor is it clear that these geographically distinct Hispanic population clusters share any genuine community of interest beyond the definitional fact that both areas are predominantly Hispanic. In addition, the boundaries of the district in Travis County exhibit clear attention to Hispanic concentration over other districting concerns. Compare the relationship of the boundaries of the district within Travis County to the Hispanic and Democratic population concentrations shown in Maps 6 and 7, respectively, for Travis County. This report uses maps showing Hispanic VAP percentages (*e.g.*, Map 6 of Travis County) and maps showing Democratic performance (*e.g.*, Map 7 of Travis County), as measured by the 2002 lieutenant gubernatorial contest; together, they allow a viewer to compare whether congressional district lines more closely correspond with partisanship or with ethnicity. Here, the disparate attention to ethnicity is apparent. Taken together these characteristics – low compactness overall, compact but widely separated and geographically distinct clusters of minority population, long relatively unpopulated connecting territory, and excessive attention to minority population when splitting political subdivisions, are clearly indicative of a district where traditional districting concerns have been supplanted by race or ethnicity as the driving force in district creation.

District 28 ranks 29th out of 32 on the "smallest circle" compactness measure in Plan 1374C at 5.0, a value

that equals the worst smallest circle measure in the existing plan of 5.0 for District 15. The "perimeter to area" compactness measure for District 28 is better at 5.7, ranking it 14th out of the 32 districts on this measure. Much (59%) of the total population and most (71%) of the minority population of the district are located in two separate split counties in the district, Webb to the south and Bexar to the north (see the density shading by block group in attached Map 8 for a visual illustration, and Maps 9 and 10 for details of partisan and ethnic concentrations in Bexar County). In addition, the boundaries of the district where it splits Hays County and Comal County exhibit clear attention to Hispanic concentration over other districting concerns. The district includes only 18 percent of the population of Comal County, but gets 45 percent of the minority population. Similarly, the district includes 59 percent of the population of Hays County, but captures 85 percent of the minority population.

District 15 ranks 31st out of 32 on the "smallest circle" compactness measure in plan 1374C at 6.5, a value that exceeds the worst smallest circle measure in the existing plan of 5.0, also for District 15. The "perimeter to area" compactness measure for District 15 is the worst in the entire plan at 11.6, compared to 8.5 for the existing District 15. Much (63%) of the total population and most (75%) of the minority population of the district are located in two separate split counties (Hidalgo and Cameron) at the southern extreme of the district (see the density shading by block group in attached Map 11 for a visual illustration). The remainder of the eleven-county meander up into central Texas is largely filler population needed to bring the district up to ideal total population (see statewide Maps 12 and 13 for illustration).

All of this ethnicity-based districting is related to the decision to shore-up the re-election prospects of Republican Congressman Henry Bonilla at the cost of weakening the

power of Hispanic voters in the 23rd District. This is accomplished by adding to District 23 the overwhelmingly Anglo and Republican Hill Country population of Kerr, Kendall, and Bandera Counties, while excluding half of the city of Laredo in Webb County. Kerr, Kendall, and Bandera Counties are 76.2 percent Anglo and have a statewide Republican index of 79.2 percent; in 2002, only 10.9 percent of the registered voters in these counties had Spanish surnames. By contrast, the population that is removed from the 23rd District in Webb County is 96.1 percent Hispanic (and 90.9 percent of the registered voters in 2002 had Spanish surnames). This population trade shifts majority status in the 23rd District from Hispanics and Democratic voters, to Anglos and Republican voters. But it still leaves over 370,000 Hispanic persons in the new 23rd District. In effect, the designers of Plan 1374C tried to show the same number of Hispanic opportunity districts as previously existed in Texas, while not utilizing all or part of 9 of the 13 counties that border Mexico, along with over 370,000 Hispanics, from the Border region that is key to all but one of the majority Hispanic districts in Texas. Their decision to do so in order to protect Congressman Bonilla was what led directly to the very apparent racial gerrymandering in the new 15th, 25th, and 28th Districts, in which every remaining available Hispanic had to be captured.

The 29th district also raises concerns in the new plan. The Hispanic population in the district is increased over its levels in the existing plan, with the percent Hispanic in the overall population rising from 62.2 percent to 66.1 percent, and the Hispanic share of the registered voters increasing from 42.5 percent to 45.9 percent. This increase is accomplished at the expense of reducing the compactness of the district, both in the numerical measures (the "smallest circle" compactness measure increases from 7.7 to 8.6 and the "perimeter to area" compactness measure increases from

2.8 to 3.1) and in the visual appearance of the district (see silhouette Map 4 as well as Maps 14, 15, and 16 for illustration). This reverses the trend in this district toward less attention to ethnicity in light of past court decisions and as the Hispanic population of the Houston area has increased. The justification for this renewed emphasis in ethnicity is apparently a misplaced concern for the ethnicity of the incumbent Congressman, Gene Green, as discussed in more detail below. There is also an increase in the minority population in the 30th district under the new plan, with the Black citizen voting-age population moving above 50 percent (from 48.6 percent in the existing plan to 50.6 percent in the new plan). Given the demonstrated history of effective minority representation in the district, it is not clear why it would need to have more minority population at this point.

Improper Emphasis on Race and Ethnicity of Representatives

Several other features of the newly adopted plan also raise the issue of an inappropriate level of attention to race and/or ethnicity. The focus on the race or ethnicity of *incumbent representatives* is apparent and openly admitted by the state. But this is clearly not a matter on which the State should be attempting to impose its will through the redistricting process. The treatment of District 23 and its incumbent representative Henry Bonilla, and the distinctly different treatment of District 29 and its incumbent representative Gene Green, clearly illustrate this. District 29 is a district with an estimated Hispanic citizen VAP of 42.8 percent and a combined Black plus Hispanic citizen VAP of 63.2 percent in the existing plan. Gene Green has a long history of election as the candidate of choice of Hispanic voters in the 29th district. According to the State's explanation to the Justice Department in support of its request for pre-clearance of 1374C (attached as Appendix B), the new plan intentionally drew Congressman Green out of

his district, and increased the Hispanic VAP of the district to 46.9 percent. This was done as part of an effort in Plan 1374C to increase the number of districts "where minorities have an opportunity to elect one of their own" (page 12). In other words, the state did not treat District 29 as a minority district because it elected an Anglo candidate. It sought to take credit for creation of a new minority district just by drawing Mr. Green out of the district.

In contrast, current District 23 is treated by the State to be a protected minority district with an estimated Hispanic citizen VAP of 57.5 percent and a combined Black plus Hispanic citizen VAP of 59.4 percent in the existing plan. The incumbent, Congressman Bonilla, is Hispanic, but is not the candidate of choice of the majority of Hispanic voters in the district. Despite this fact, district 23 is listed by the State as one of the eight districts in the existing plan that "are currently electing candidates that can be legitimately described as candidates of the minority communities' choice" (page 9). (Note that District 29 is not among those eight districts according to the State's definition of the appropriate Section 5 baseline.) It is apparent that Congressman Bonilla and District 23 make the cut for this list in large part because Congressman Bonilla is Hispanic, and that Congressman Green and District 29 are not on the list because Congressman Green is not Hispanic. The fact that the citizen minority population in District 23 is reduced below 50 percent in 1374C is excused by the fact that the new district will presumably re-elect Congressman Bonilla (the reduction in minority population is accompanied by an increase in the statewide Republican index) and thus all of the "current Hispanic incumbents are likely to be reelected under this plan" (page 13).

Thus both of these existing Hispanic districts are treated in ways that are highly unusual for protected minority

districts. In both cases the ethnicity of the incumbent is offered as the rationale for this treatment. District 23 is the most precarious of the state's Hispanic districts given its nearly even partisan split, but instead of shoring it up, the new plan intentionally weakens the district. The explanation for hurting the district is that it helps the incumbent, and since he happens to be Hispanic, that makes it all right. District 29 has always elected Gene Green, who is the Hispanic candidate of choice, but he is moved to a new district with only 1.1% of his current constituency in it. The explanation for hurting the incumbent is that it helps the district, but only because the incumbent happens to be an Anglo.

What is clear is that the proper focus on the voters has been supplemented in this plan with a direct focus on the race and ethnicity of the representatives. The race and ethnicity of candidates is often an important, useful, appropriate focus in an assessment of cohesion and polarization for Voting Rights Act purposes. But nothing in the analytical use of candidate race or ethnicity justifies attempts to *control* the race or ethnicity of representatives through the redistricting process.

Partisan Gerrymandering

Partisan gerrymandering is an attempt to control the partisan results of elections held under a given plan, just as racial gerrymandering is an attempt to control the racial results of elections by altering features of a given plan. As with racial gerrymandering, a key concern is the degree to which partisan concerns override other traditional districting concerns. Several techniques are common, and two techniques that relate to existing incumbents are differential pairings that disadvantage one party to the benefit of the other, and differential disruptions of existing district constituencies (also called "core retention") that disadvantage

one party to the benefit of the other. More broadly, the degree to which one party's voters have been "packed" into some districts and "cracked" among other districts can dramatically shift the degree to which a map fairly translates changes in the wishes of voters into changes in the outcomes of elections. Each of these will be addressed in turn below. Note that while there are clear similarities in racial and partisan gerrymandering, there is also a key distinction. Racial gerrymanders focus at the district level, and evidence of them is largely at that level. Partisan gerrymanders are a characteristic of the configuration of districts in the whole state plan, and are largely examined at that level.

Partisan Bias

Partisan bias is created by disparately "packing" and "cracking" adherents of one of the parties. The extent and nature of partisan bias in the new plan can be assessed by examining the pattern of statewide election results within the voting precincts that make up each of the new districts. This "reconstituted" election analysis can show, for example, that in a statewide race where the two parties' candidates run evenly, one would likely carry 22 districts and the other 10. That would be a result of disparate "packing" and "cracking."

An analysis based on statewide elections is the same form of partisan analysis that the Texas Legislative Council provides to map drawers to assist them in gauging the partisan consequences of various alternative plans. The typical TLC report averages together all of the statewide elections in a given year to provide a summary "statewide index" for that election year.[1] While this is a useful summary

[1] The use of reconstituted statewide election results to compare various redistricting plans is commonplace. The utility of using these elections rests in part on the fact that the quality of the match between the statewide averages and the actual congressional election results is typically quite high. A check of the match here reveals much the same

indicator, it sacrifices variation across contests in favor of parsimony.

The analysis here extends this same approach in several ways - primarily by disaggregating the statewide contests in a given year and assessing the plan under each contest individually. This yields a substantial increase in the variety of actual election patterns that are available. Variations in such factors as candidate quality, race and ethnicity, funding, and regional basis of support are all represented in increasing numbers as the number of individual elections increases. Here, by using all of the statewide contests in 1992, 1994, 1996, 1998, 2000, and 2002 the total number of individual reconstituted elections is 64, a very substantial number. This is also one more election cycle than we would typically have available, as the 2002 elections from the new decade are included.

For both the existing plan and the new plan, each of the 64 statewide contests is re-aggregated from the VTD (geographic precinct) level up to the congressional district level. For each election this yields 32 sub-state results, one for each congressional district. The mean statewide Republican share of the vote can then be calculated by

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result as has been found elsewhere. Using VTD (precinct) level data we can assess the degree of association between the statewide average Republican vote share and the actual Republican vote share in the contested 2002 congressional elections. The standard methodology here is a simple OLS regression analysis with incumbency added as a control. The resulting precinct level correlation between the average statewide Republican vote share and the actual congressional Republican vote share is extremely high, whether we look at the average for just the 2002 statewide elections ($r=.96$, $R^2=.91$), or the broaden the analysis to include the 42 statewide elections between 1996 and 2002 ($r=.95$, $R^2=.90$). These results also provide an estimate of incumbency advantage that shows a 10.5 percentage point boost for the party of the incumbent where the incumbent is seeking re-election.

averaging the Republican share of the two-party vote across the 32 districts. Finally, each individual district result can then be characterized by whether it is more Republican than the statewide average for that contest (indicating a pro-Republican tilt in that district) or less Republican than the statewide average for that contest (indicating a pro-Democratic tilt in that district).

For example, in the 2000 Bush-Gore presidential contest, the average two-party vote for Bush across the 32 congressional districts in the existing plan was 58.9 percent. In Plan 1374C's 31st District, Bush received 71.6 percent of the major-party vote, running well ahead of the statewide district average, and indicating a district that tilts more Republican than the average district in the state. Contrast that result with the 30th District, where Bush got only 30.9 percent of the vote. Here, Bush is clearly running well behind the statewide district average, indicating a district that tilts more Democratic than the average district in the state.

Note also that any district that has a result more favorable than average to the Republican candidate is a district that the Republican would carry even in a 50/50 or "dead heat" election. We can *adjust* all the precinct results downward for Bush sufficiently to turn an actual 58.9 percent average district result into a 50.0 percent dead heat. This procedure, often referred to as "normalizing" the results to "50-50," allows us to gauge how a plan would tilt in an even partisan split, even though the actual elections themselves were not even splits. This allows us a measure of partisan bias by indicating the degree to which a map, through differential packing and cracking of partisans voters, allows one party to win a majority of the seats even though they have no advantage in the average vote share. As noted below, partisan bias should not be confused with the natural tendency in most geographic districting plans to over-reward

the victor in an election by giving a disproportionately large share of the seats for a given share of the vote above 50 percent. In most geographic plans 55 percent of the vote will yield more than 55 percent of the seats to whichever party wins that majority. This tendency to over-reward the winning party is related to the responsiveness of a plan to vote shifts, and can be neutral in that it offers the same bonus to any party that happens to win. This is separate and distinct from whether the plan tends to durably produce a victory in seats for one of the two parties, when the average vote share is 50-50. To be neutral in this sense, a plan need not always yield a 50-50 seat split for a 50-50 average vote split, but it should yield roughly as many pro-Democratic results as pro-Republican results.

Table 1 summarizes the results of this sort of election analysis for both the existing plan (1151C) and the new plan (1374C). The table reports the breakdown of the 64 statewide contests according to the relative Republican/Democratic share of seats that the election voting would have produced if it was normalized to a 50-50 contest (i.e. the relative number of districts that are more or less Republican than the statewide district average). Under the existing plan, the results vary across the 64 elections from two elections that yield a 13R-19D split, to two contests that produce a 20R-12D split. Remember that these are not the party splits in terms of which party actually carried each district, but instead the results in terms of how many seats the parties would have carried even if the votes were adjusted to a 50-50 statewide average in the contest. Overall, the existing plan exhibits a pro-Republican tilt. Seven elections fall on an even 16R-16D split, and 13 elections show splits that favor the Democrats, compared to 44 elections that show pro-Republican splits. This is also reflected in the mean, the median and the mode, all suggesting that the plan centers on a 17R-15D split at a 50-50 statewide average vote split.

The results for the new plan are substantially different than those for the existing plan. In fact, every single one of the 64 elections produced an outcome that gave the Republicans a seat advantage in an even (normalized to 50-50) contest. Fifty of the 64 contests exhibit a 21R-11D or 22R-10D split at 50-50, a level of pro-Republican tilt that the existing plan never reaches in even a single contest. These results under the new plan center on a 22R-10D split, with both the median and the mode falling there; the mean of 21.1 falls closer to a 21R-11D split.

Tables 2, 3, and 4 break the 64 statewide election contests down by years into three on-year/off-year pairs (2000-2002, 1996-1998, and 1992-1994). This allows us to see if the results in Table 1 are unique to one time period, and to see if the most current elections suggest any important trends in bias. As we can see from Table 2, the 20 most recent elections (2000-2002) exhibit the same overall pattern as in Table 1, with both plans favoring Republicans, but with the pro-Republican bias most extreme in the new map. The degree of bias in the existing map (1151C) is however notably higher in this most recent set of elections (centering on 19R-13D), but even the most biased outcome under the existing map (20R-12D) falls below the least biased outcome (21R-11D) under the new map. Table 3 shows much the same pattern for the 1996 and 1998 contests, though here we can see that the bias for the existing plan is now more moderate (centered on 17R-15D) and in line with what it was for the full set of 64 elections. Table 4 takes us the furthest away in time from the current concern (ten years separate the 1994 election from the upcoming 2004 elections that would be the first under the new plan). Here the pattern is notably different for the existing plan. For the 22 statewide elections in 1992 and 1994 the existing map actually tilts modestly pro-Democratic, centering on a 15R-17D split, and with only seven of the 22 elections showing a pro-Republican split.

The sharp contrast with the new map, however, persists even here. All 22 of the elections exhibit a pro-Republican split, and the plan centers on a 20R-12D or 21R-11D split. Overall, if there is trend in the partisan bias as we move closer to 2004, it clearly favors pro-Republican seat splits.

The contrast between the plans can be summarized in two characteristics. First, the new plan has a much higher bias in favor of Republicans, with 4 or 5 more Republican seats and 4 or 5 fewer Democratic seats, even in an election where the average voter split is even. Second, the variation in possible results across different contests is much lower in the new plan. Compare the seat splits in the most recent elections (Table 2, 2000-2002) to the seat splits in the most distant elections (Table 4, 1992-1994). For the existing plan the contrast is striking and substantively meaningful. For the new plan the only difference is a small change in how pro-Republican the bias is. Thus the new plan is not only significantly *more* biased in favor of Republicans, but also much more *dependably* biased. As we can see from the 1992-94 results, in at least some election scenarios represented in the 64 contests, the existing plan produces something other than a solidly pro-Republican seat split for a 50-50 average vote split. The new plan never produces an even seat split in a single contest, despite normalizing the vote to an even average split.

This comparison between the pattern of bias and responsiveness in the two plans can also be presented visually. Chart 1 presents the information in Table 1 in bar chart form. Here again, the distinct between the two plans is stark. At a 50-50 vote split, the plan shifts the results substantially toward the Republican end of the chart, while simultaneous concentrating most of the results in a single biased outcome (22R-10D). In contrast, the existing plan is both less biased and more varied. This same pattern can be

seen more broadly by using the same sort of bar chart, but looking at the seat patterns across the 64 elections without normalizing the results. That is, we are looking simply at the number of districts carried by the Republican statewide candidate in each of the 64 elections, no matter how lopsided that statewide contest may have been. Chart 2 presents these un-adjusted results, and if anything the pattern is starker than was the case for the '50-50' results in Chart 1. As we would expect given the general Republican advantage in statewide elections over this period (the mean and median is 54 percent Republican for the two-party vote share in the 64 statewide elections), the existing plan centers around a pro-Republican split, at 20R-12D. While centered at 20R-12D, the existing plan nonetheless shows that the pattern of seat results can vary substantially across different elections, and in fact less than one-quarter (15 of 64) of the seat splits fall at 20R-12D. In contrast, the new plan is overwhelmingly a 22R-10D plan. More than two-thirds (43 of 64) of the results are in this one category, and no other seat split appears more than two times.

The relative bias and responsiveness of the new plan can also be seen clearly in a visual comparison of the relationship between the actual average vote share for Republicans in each of the 64 statewide elections from 1992 to 2002 and the share of the seats under the existing and new plans that the Republican statewide candidate carried in those same 64 elections. Graph 1 presents this data for the existing plan (1151C) and Graph 2 presents the same election data for the new plan (1374C). The existing plan shows a fairly responsive and relatively unbiased election pattern. When the average Republican vote share is above 50 but below 55 percent, the Republican seat share falls between 53 percent (17R-15D) and 69 percent (22R-10D) of the seats. When the average Democratic vote is above 50 but below 55 percent, the Democratic seat share falls between 47 percent (17R-15D) and 66 percent (11R-21D) of the seats. Across the

entire range of election outcomes, shifts in vote share generate some degree of shift in seat share. This is in contrast to the pattern in the new plan (1374C) in Graph 2. Here, when the average Republican vote share is above 50 but below 55 percent, the Republican seat share never varies from its locked-in 69 percent (22R-10D) of the seats in even one of the 28 elections in this range. Indeed, even in the higher vote range between 55 and 60 percent of the vote, 15 of the 19 elections exhibit the same 22R-10D pattern. In contrast, when the average Democratic vote share is above 50 but below 55 percent, the Democratic seat share varies widely between 31 percent (22R-10D) and 66 percent (11R-21D) of the seats. Within that range of outcome, five of the nine elections generate seat splits actually favoring the Republicans, who carried between 19 and 22 seats despite losing the vote statewide. The most apparent difference between the picture for the existing plan in Graph 1 and the new plan in Graph 2 is the long flat section in which the new plan exhibits very little response to shifts in voter sentiments. In the 48 elections that fall between 48 percent Republican and 58 percent Republican, 42 produce the exact same 22R-10D seat share, and none shows less than 19 Republican seats. In short, the new plan does not pay for its apparent partisan bias in increased responsiveness; it is instead both clearly biased and *less* responsive.

The relatively modest pro-Republican bias in the existing plan also demonstrates that the much more extreme bias in the new plan is not simply a natural outgrowth of the way in which partisan voters are distributed across the geography of the state. If this were true, then we would see a similar degree of bias in both plans. Nor does the existing plan distort district outlines to achieve this reduction in bias – again, what you would expect if the natural distribution of partisans favored one party. The existing plan's districts are in fact actually measurably more compact than the new

plan's districts. It is also important to distinguish the bias in the new plan from the natural tendency mentioned above for most geographic districting plans to over-reward the victor in an election. Most plans offer an exaggerated reward in terms of the gain in the percentage of seats as the winning party moves up above 50 percent of the vote. In modern U.S. House elections for example, gains of one percentage point in average vote share typically yield gains of about two percentage points in average seat share. Applying this to Texas we would expect an increase in vote share of five points, moving from 50 percent of the vote to 55 percent of the vote, to yield a seat increase of ten percentage points, moving you from 50 percent to 60 percent of the seats (i.e. from 16 to 19 seats). Here, the new plan is not simply exhibiting this natural tendency to over-reward victors. It builds in a dramatic over-reward even at an average 50-50 vote split.

Treatment of Incumbents

Nothing in this re-redistricting requires pairings. There is no decrease in the number of seats, no known shift in the population distribution, and no increase in required Voting Rights Act districts. Pairings in the new plan are entirely a matter of choice – and the nature of the actual pairings is highly partisan and one-sided.

The new District 2 in Plan 1374C pairs two incumbent Democrats, Congressman Green and Congressman Lampson, in a district that has a 60.6 percent Republican statewide index for 2002, according to the TLC. The new district includes only 1.1 percent of Congressman Green's current 29th District population and slightly less than half of Congressman Lampson's current 9th District population.

Three incumbents are "triple paired" in the new District 6, two Democrats, Congressman Frost and

Congressman Turner, and one Republican, Congressman Barton. The 6th is Congressman Barton's current district, and it includes 66.4 percent of his old constituency in a new district that has a 64.1% Republican statewide index. Congressman Frost's old district (the 24th) contributes only 21.6% of its population to the new 6th District (and that included portion of the old 24th has a Republican statewide index of 59.1 percent, even though it comes out of an existing district with a 60.6 percent Democratic statewide index). Congressman Turner's old district (the 2nd) contributes only 4.4% to the new 6th District, a fact that's not surprising given the highly dissimilar geography.

One Democrat, Congressman Bell, and one Republican, Congressman Culberson, are paired in the new 7th District (with a Republican statewide index of 70.2%). Bell's old district (the 25th) contributes only 18.8% of its population to the new 7th District, and this included portion of the existing 25th has a Republican statewide index of 63.7 percent, even though it comes out of an existing 25th district with a Democratic statewide index of 51.5%. In contrast, Culberson stays in his existing 7th District and its new configuration retains 51.8% of the existing 7th District population and is, as noted above, overwhelmingly Republican.

The new 19th District pairs Democratic Representative Stenholm with Republican Representative Neugebauer in a rather bizarre new District with a Republican statewide index of 69.0%. Stenholm's existing 17th District contributes only 30.9% of the population of the new 19th District, while Neugebauer's existing 19th District contributes 57.5%.

The four remaining unpaired Anglo Democrats do not escape unscathed. Representative Sandlin remains in the first district, but 59.9% of the population in this reconfigured 1st

District is from outside of the existing District and the new District is 5 points more Republican than the existing 1st District. Congressman Hall remains in the 4th District but 66.1% of the district population is new.

Congressman Doggett remains in the 10th District, but it is radically reconfigured. The existing 10th is an East Austin District wholly in Travis County. The new 10th District takes its inspiration from the existing 31st District, but where the existing 31st stayed north of Travis County in Williamson County, the new 10th District drops Williamson County (to craft a new 31st anchored in Williamson and Bell Counties that is secure for incumbent Republican Congressman Carter), and swaps its population for suburban northeast Travis County and at the other end of the district dips deeper into suburban northwestern Harris County, with almost as much population in Harris County as in Travis County.[2] Congressman Edwards is shifted from the current 11th District, with a Republican statewide index of 62.8% to the new 17th District with a Republican statewide index of 64.0%. Only 35.2% of Congressman Edward's existing 11th District population follows him into the new 17th District.

In short, whether by pairings or by district submergence, every Anglo Democratic incumbent is clearly targeted by this re-drafting of the Texas congressional map. Not a single Anglo Democratic incumbent lives in a district that retains 50% or more of his current constituency.

The Texas Legislative Council district-overlap analysis allows for a summary assessment of "core retention" by simply looking at the proportion of an incumbent's

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2 The fracturing of Travis County was controversial. The chairman of the Travis County Republican Party said: "I don't care if Austin is divided eight ways as long as Doggett is gone." (Austin-American Statesman, June 29, 2003.)

existing district population that remains with the incumbent in the new map. The average proportion of population retained in the new plan for the 15 Republican incumbents is 61%, while the average population retained for the 17 Democratic incumbents is 47%. This clearly shows the bias and disruption of Democratic incumbent districts, but it also understates this bias considerably. Many of the Democratic incumbents represent protected minority districts, where Voting Rights Act considerations limit the extent of potential disruption. If we look only at the Anglo Democratic incumbents, the average proportion of population retained by the incumbent drops to 27%. Only 1 Republican incumbent, Congressman Bonilla, lives in a protected minority district under Plan 1151C, and if we exclude that district, the average population retained for the remaining 14 Republican incumbents is still 60%.

Conclusion

Several central concerns are important here, as they have been in other redistricting disputes. First, redistricting is not simply a weapon to be freely used to advance any party, political, policy, or personal interest. Redistricting is an essential, albeit disruptive, maintenance task for the sort of the single-member geographic representation scheme that characterizes most U.S. legislative bodies. And what is being maintained is nothing less than the central linkage of democratic governance. Where a central feature of representation provides an opportunity for manipulation, pressure to exploit that opening will always be present. The system must have some credible set of constraints on that pressure to preserve its integrity, and to sustain public confidence. This basic notion informs much of the effort to limit the range of redistricting choice in areas like malapportionment, vote dilution, and racial gerrymandering. Second, a related reality is that legislatures are often too

much a part and a product of the abuses of redistricting to have any realistic ability to reign themselves in once they have jumped the traces. Third, abuses at the heart of representation weaken the legislature itself.

Partisan gerrymandering, and the mid-decade redistricting that is the next logical step in its rapid escalation, illustrate all three of these central themes. What could better illustrate that partisan pressure on redistricting has moved beyond its past constraints, than a redistricting without a reapportionment that is defended by its proponents as being solely about gaining seats for their party? Redistricting in this guise is truly a democratic plow-share being beaten into a partisan sword. The openness with which this is being done suggests that participants rightly understand that there will be no successful legislative response. As was the case with the malapportioned U.S. House of the 1960, the deeply divided, fiercely partisan, and highly unresponsive current House is far too much a product of this abuse to be able to end it. Absent such a response, further escalation is inevitable. As manipulated redistricting ratchets down electoral responsiveness, the political effort inevitably will shift to winning redistricting instead of trying to win elections in the ever dwindling pool of competitive seats. In turn, this of course leads to a further ratcheting down of competitive seats, and the process spirals further out of control. The earlier discussion of Congressman DeLay's role in the Texas redistricting reflects this key reality. It is easy to see today's Republican partisan gerrymander as revenge for yesterday's Democratic gerrymander, or a gerrymander in Texas as revenge for a gerrymander in Georgia. But the larger and more sobering truth is that this is not simply hot-headed political payback. With each additional gerrymander, the options for responding with anything but another gerrymander diminish, and we are rapidly reaching the point where national politicians who

believe in what their party wants to achieve will have no option but to build their legislative strength with the only tool left that can shift seats in the locked-down environment that partisan gerrymandering itself helped to construct.

The fact that partisan gerrymandering has moved from simple revenge to the only game in town is clear in the Texas case. Despite the public spin that the new plan is merely an attempt to "un-do" a Democratic partisan gerrymander, no one with any redistricting experience believes this. The existing plan is simply not a partisan gerrymander in even the broadest possible sense of the term. In contrast, the new plan is, and was crafted to be, a very effective partisan gerrymander. From a national perspective, the option to leave alone states that have neutral plans, and just focus on reversing existing partisan gerrymanders, is increasingly unrealistic. The mid-decade redrawing of the map in Texas is just the leading edge. States that have tried to tame the redistricting process unilaterally by moving to non-partisan commissions will be next. If either party sees the opportunity to gain seats by moving a state legislature back into the redistricting business, the pressure to do so will be enormous. For national Democrats and Republicans alike, there are no longer any innocent neutrals in this battle. If a state is not part of the solution, it is part of the problem, and it will be dragged into gerrymandering kicking and screaming if need be.

Dated: November 14, 2003

/s/

John R. Alford

Table 1

All 64 Statewide Elections from 1992 to 2002				
Number of Seats More Republican than the Mean Statewide Vote and the Number of Seats More Democratic than the Mean Statewide Vote				
Republican-Democratic Seats in a given election out of 32	How many of the 64 elections show this pattern of Seats			
	1151C		1374C	
Seats	Number	%	Number	%
10R-22D				
11R-21D				
12R-20D				
13R-19D	2	3.1%		
14R-18D	4	6.2%		
15R-17D	7	11.0%		
16R-16D	7	11.0%		
17R-15D	22	34.4%	3	4.7%
18R-14D	7	11.0%	5	7.8%
19R-13D	13	20.3%	1	1.6%
20R-12D	2	3.1%	5	7.8%
21R-11D			12	18.8%
22R-10D			38	59.4%
Mean	17.0		21.1	
Median	17		22	
Mode	17		22	

Table 2

The 20 Statewide Elections from 2000 to 2002				
Number of Seats More Republican than the Mean Statewide Vote and the Number of Seats More Democratic than the Mean Statewide Vote				
Republican-Democratic Seats in a given election out of 32	How many of the 20 elections show this pattern of Seats			
	1151C		1374C	
Seats	Number	%	Number	%
10R-22D				
11R-21D				
12R-20D				
13R-19D				
14R-18D				
15R-17D				
16R-16D				
17R-15D	2	10.0%		
18R-14D	5	25.0%		
19R-13D	12	60.0%		
20R-12D	1	5.0%		
21R-11D			3	15.0%
22R-10D			17	85.0%
Mean	18.6		21.8	
Median	19		22	
Mode	19		22	

Table 3

The 22 Statewide Elections from 1996 to 1998				
Number of Seats More Republican than the Mean Statewide Vote and the Number of Seats More Democratic than the Mean Statewide Vote				
Republican-Democratic Seats in a given election out of 32	How many of the 22 elections show this pattern of Seats			
	1151C		**1374C**	
Seats	Number	%	Number	%
10R-22D				
11R-21D				
12R-20D				
13R-19D				
14R-18D				
15R-17D				
16R-16D	5	22.7%		
17R-15D	15	68.2%		
18R-14D	1	4.5%	1	4.5%
19R-13D	1	4.5%		
20R-12D				
21R-11D			3	13.6%
22R-10D			18	81.8%
Mean	16.9		21.7	
Median	17		22	
Mode	17		22	

Table 4

The 22 Statewide Elections from 1992 to 1994				
Number of Seats More Republican than the Mean Statewide Vote and the Number of Seats More Democratic than the Mean Statewide Vote				
Republican-Democratic Seats in a given election out of 32	How many of the 22 elections show this pattern of Seats			
	1151C		**1374C**	
Seats	Number	%	Number	%
10R-22D				
11R-21D				
12R-20D				
13R-19D	2	9.1%		
14R-18D	4	18.2%		
15R-17D	7	31.8%		
16R-16D	2	9.1%		
17R-15D	5	22.7%	3	13.6%
18R-14D	1	4.5%	4	18.2%
19R-13D			1	4.5%
20R-12D	1	4.5%	5	22.7%
21R-11D			6	27.3%
22R-10D			3	13.6%
Mean	15.5		19.7	
Median	15		20	
Mode	15		21	

Chart 1

Number of Seats More Republican than the Statewide Mean in 64 Elections
(Republican Seats at 50-50 Vote Split)
from 1992 to 2002
Comparison of Plans 1151C and 1374C

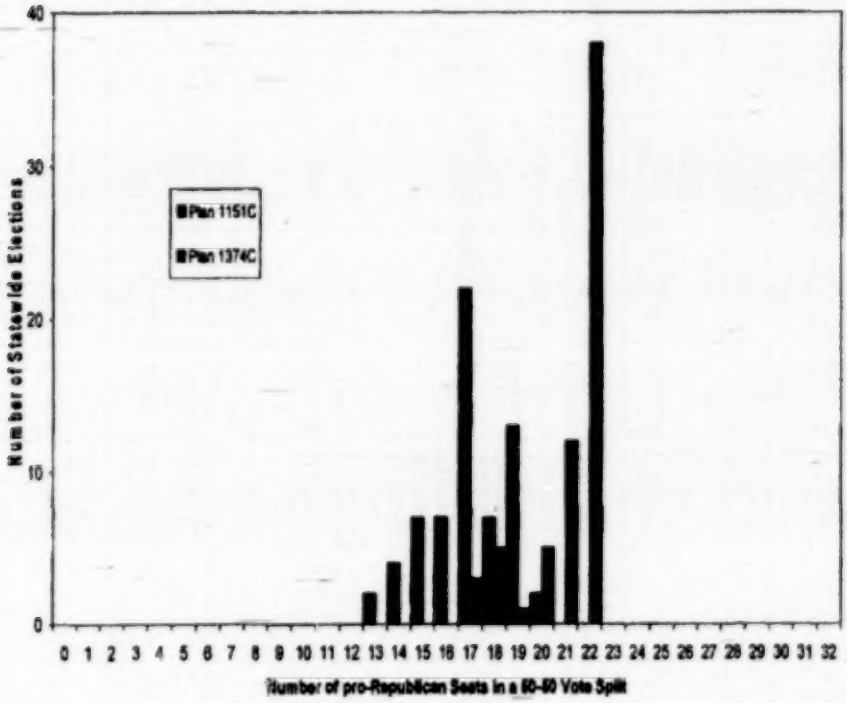
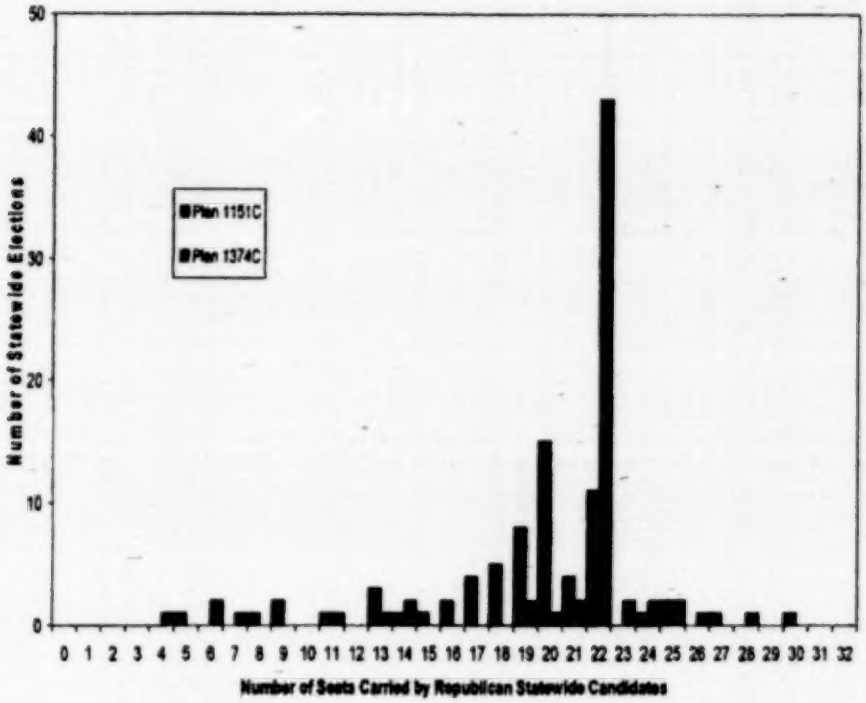


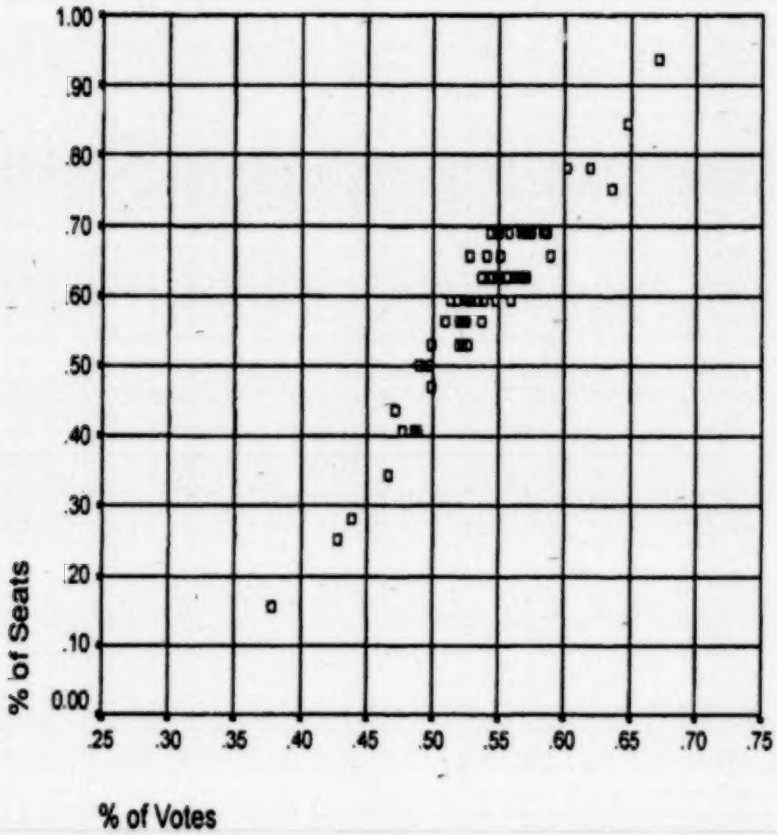
Chart 2

Number of Seats Carried by Republican Candidates in 64 Statewide Elections from 1992 to 2002
Comparison of Plans 1151C and 1374C



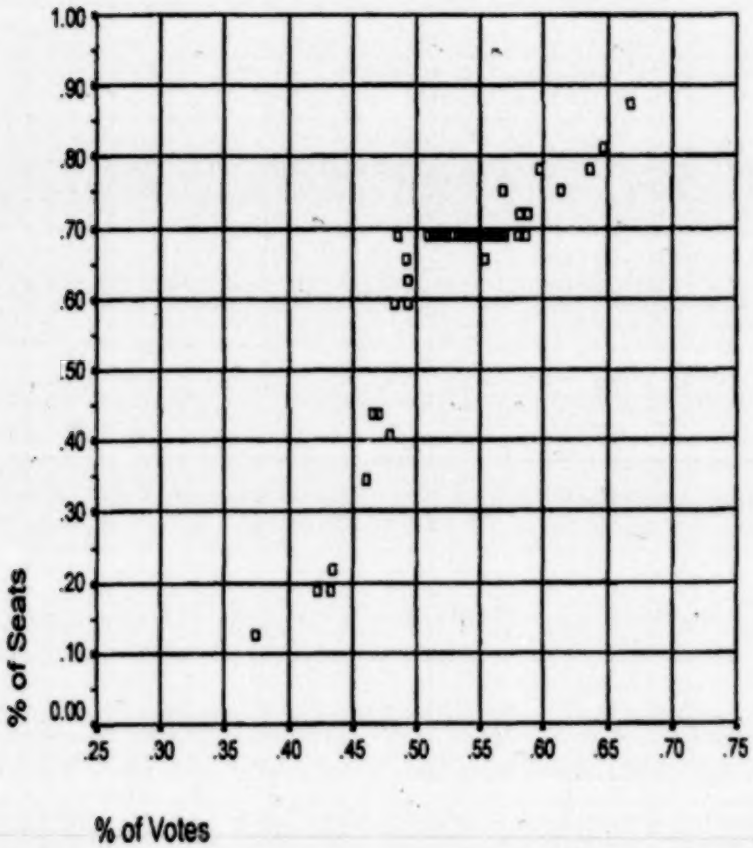
Graph 1

Republican Seats vs. Votes for Plan 1151C for the 64 Statewide Elections from 1992 to 2002



Graph 2

Republican Seats vs. Votes for Plan 1374C
for the 64 Statewide Elections from 1992 to 2002



REPORT OF ALLAN J. LICHTMAN ON VOTING-RIGHTS ISSUES IN TEXAS CONGRESSIONAL REDISTRICTING

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November 14, 2003

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Introduction

1. I have been asked to examine the implications for the voting rights of minorities in Texas of the proposed redistricting Plan 1374C enacted by the state legislature. This review focuses on the effects of Plan 1374C on opportunities for minority voters to participate fully in the political process and to elect candidates of their choice to Congress. It examines as well the issue of intentional discrimination against minorities through the fragmentation of minority voting strength in existing districts. It also studies the effects of Plan 1374C on the opportunities for minorities to participate fully in the political process through consequentially influencing congressional elections. I have, in this study, reached the following conclusions developed in detail below:[1]

> Voting by Anglos and minorities in Texas is polarized along racial lines in both primary and general elections. Hispanic and African-American voters are cohesive in supporting candidates of their own race in primary elections and Democratic candidates in general elections. Anglo voters in turn usually bloc vote against the candidates of choice of minority voters in primary and general elections. This pattern of racial bloc voting is found across Texas through the 1990s and early twenty-first century, including all regions of the state discussed below.

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[1] Given the time constraints of its production, this report may be revised or updated. I would also anticipate providing rebuttal testimony to the testimony of experts for defendants.

In the Dallas/Tarrant County region, Plan 1374C impedes opportunities for minority voters to participate fully in the political process and to elect candidates of their choice by fragmenting or cracking minority communities, thereby submerging minority voters in districts dominated by Anglo voters.

As demonstrated by Congressional District 24 (CD 24) in current Plan 1151C, it is feasible to remedy this fragmentation and create a second district in the Dallas/Tarrant region (in addition to CD 30) in which African-American voters have an effective opportunity in primary and general elections to elect candidates of their choice to Congress.

The fragmentation of black voters in the Dallas/Tarrant area represents an intentional effort to deny black voters the opportunity to participate fully in the political process and to elect candidates of their choice to Congress. Examination of the redistricting maps provides convincing evidence of a deliberate fragmentation of African-Americans and their submergence in Anglo-dominated, heavily Republican districts where black voters will lack even minimal influence over the congressional election and will be represented by Members of Congress who do not share their priorities and interests. Such fragmentation is not justified by such nonracial districting criteria as geographic compactness, the preservation of whole counties and cities, protection of senior

incumbents, unification of communities of interests, and retention of the cores of previous districts. To the contrary, the fragmentation of African-Americans in Plan 1374C subverts rather than advances these criteria, demonstrating the racial intent of Plan 1374C.

The fragmentation that takes place in the Dallas/Tarrant region is not offset by efforts to enhance the black component of one of the Houston-based majority-minority districts. Whereas, the fragmentation in Dallas/Tarrant will clearly make it a practical impossibility for African-Americans in the area of CD 24 to elect candidates of their choice to Congress, it is unclear whether changes in the Houston area will have any substantial impact on black voter opportunities in congressional elections.

Plan 1374C also fragments Hispanic voter strength in the southwestern area of the state covered by Congressional District 23 in Plan 1151C. New Congressional District 23 created for this region of the state under Plan 1374C is not an effective opportunity district for Hispanic voters because it dilutes Hispanic voter strength. However, as indicated by Congressional District 23 under Plan 1151C, it is feasible to create an effective Hispanic opportunity district in this part of southwest Texas.

The fragmentation of Hispanic voter strength in the southwest is not offset by

changes elsewhere in Plan 1374C. Plan 1374C does not enhance the opportunity for Hispanics to elect candidates of their choice in the Houston area through changes to CD 29. Plan 1374C does attempt to create an additional Hispanic opportunity district that runs from the Mexican border to Austin (CD 25), but it does so by jeopardizing the opportunities for Hispanic voters to elect candidates of their choice in general elections in Congressional District 15. Thus, the net effect of Plan 1374C for Hispanic voters is to weaken their opportunities to participate fully in the political process and to elect candidates of their choice to Congress.

Plan 1374C also dismantles seven districts (CDs 1, 2, 4, 9, 10, 11, and 17) in which African-American and Hispanic voters play a critical role in determining the election of candidates in general elections – Anglo Democratic representatives who have faithfully represented minority interests in Congress. The minority voters in these influence districts are submerged under Plan 1374C within heavily Republican districts – often with Republican incumbents – in which they will have no influence on the outcome of general elections and will be represented by Members of Congress who do not share their priorities and interests.

For the state of Texas there are major turnout differences between Anglos, blacks, and Hispanics, with Anglo turnout substantially higher than black or Hispanic

turnout. These turnout differences reflect the substantially higher socio-economic status of Anglos relative to blacks and Hispanics in Texas.

I. Background and Qualifications

2. I am a Professor of History at American University in Washington, D.C. Formerly, I served as Chair of the History Department and Associate Dean of the College of Arts and Sciences at American University. I received my BA in History from Brandeis University in 1967 and my PhD in History from Harvard University in 1973, with a specialty in the mathematical analysis of historical data. My areas of expertise include political history, voting analysis, and historical and quantitative methodology. A copy of my curriculum vitae, which accurately sets forth my professional qualifications and experience, is attached to this report as Appendix 1, along with a table of cases. I am being compensated at a rate of $300 per hour.

3. I am the author of numerous scholarly works on quantitative methodology in social science. This scholarship includes articles in such academic journals as *Political Methodology*, *Journal of Interdisciplinary History*, and *Social Science History*. I have also coauthored, with Dr. Laura Langbein, *Ecological Inference*, a standard text on the subject of inferring the behavior of population groups from data collected for political units such as voting precincts. In addition, I have published articles on the application of social science analysis to the Voting Rights Act. This work includes articles in such journals as the *Journal of Law and Politics*, *La Raza Law Journal*, *Evaluation Review*, *Journal of Legal Studies*, and *National Law Journal*. My scholarship also includes the use of quantitative and qualitative techniques to conduct political and historical studies of

voting, published in such academic journals as *The Proceedings of the National Academy of Sciences*, *The American Historical Review*, and *The Journal of Social History*. Quantitative and historical analyses also ground my books, *Prejudice and the Old Politics: The Presidential Election of 1928*, *The Thirteen Keys to the Presidency* (co-authored with Ken DeCell), and *The Keys to the White House*.

4. I have worked as a consultant or expert witness for both plaintiffs and defendants in more than seventy voting-rights and redistricting cases. I have been admitted as an expert witness in voting rights, political history, political systems, statistical methodology, quantitative analysis of voting, and socioeconomic analysis, among other matters, in more than sixty court cases in which I have presented oral or written testimony. I have testified in several voting-rights and redistricting cases in Texas, including in-court testimony on congressional redistricting in Texas following both the 1990 and 2000 Censuses.

5. As indicated by Bernard Grofman, Lisa Handley, and Richard G. Niemi, in their standard text, *Minority Representation and the Quest for Voting Equality*, I was one of three scholars who independently developed the standard "two-equation" ecological regression methodology accepted by the U.S. Supreme Court in the path-breaking case on voting-rights analysis, *Thornburg v. Gingles*, 478 U.S. 30 (1986), and used as the standard procedure for analyzing minority and white voting in voting-rights litigation. The ecological regression methodology is developed in my co-

authored book, *Ecological Inference*, and analyzed in my December 1991 article in *Evaluation Review*.[2]

II. Voting Is Polarized Along Racial Lines in Texas Primary and General Elections

6. Because this is not my first experience analyzing Texas electoral and demographic data, I will begin by summarizing my earlier findings and then will update them based on my latest analyses. For purposes of the *Vera v. Richards* litigation in 1994, I conducted an ecological regression analysis of voting in Texas, focused on primary elections, which found that as part of a pattern of racially polarized voting in the state, minority voters were usually cohesive in support of candidates of their choice, and Anglo voters usually bloc voted against the candidates of choice of minorities.[3] Specifically, my report included the results of ecological regression analyses for nine majority-minority congressional districts, covering the period from 1986 to 1992. The results of this analysis showed a clear pattern of cohesion among minority voters: substantial majorities of Hispanic voters voted for Hispanic candidates in elections involving Hispanic and Anglo candidates, and a substantial majority of African-American voters voted for African-American candidates in elections involving Anglo and black candidates. Likewise the results showed a clear pattern of

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[2] Bernard Grofman, Lisa Handley, and Richard G. Niemi, *Minority Representation and the Quest for Voting Equality* (Cambridge: Cambridge University Press, 1992), p. 146; Laura Irwin Langbein and Allan J. Lichtman, *Ecological Inference* (Sage Series on Quantitative Applications in the Social Sciences, 1978); Allan J. Lichtman, "Passing the Test: Ecological Regression in the Los Angeles County Case and Beyond," *Evaluation Review* (1991).

[3] "Final Report of Allan J. Lichtman, *Vera v. Richards*," June 26, 1994.

bloc voting by Anglos against black and Hispanic candidates of choice.

7. In testimony on congressional and state legislative redistricting following the 2000 Census, I updated this analysis of racially polarized voting, confirming minority cohesion and Anglo bloc voting across the state of Texas. The updated analysis looked at statewide primary and general elections in major counties with large concentrations of minorities: Bexar, Cameron, Dallas, El Paso, Harris, Hidalgo, Nueces, Tarrant, and Travis.[4] The analysis also examined "Anglo versus minority" Democratic primary and runoff elections for state representative, state senate, and Congress in which Anglo candidates competed against minority candidates.

8. Tables 1 and 2 report ecological regression estimates of Hispanic, black, and Anglo voting in statewide "Anglo versus minority" primary elections. To include counties from rural south Texas, the analysis of statewide Hispanic-versus-Anglo primaries supplemented the county-level analysis with Congressional District 28 under the pre-2000 plan. Table 1 reports results for five Hispanic-versus-Anglo statewide primary elections from 1994 to 1998. These include the primary and runoff elections for Supreme Court Place 8 in 1994 (Gonzalez), the primary and runoff elections for United States Senate in 1996 (Morales), and the primary for Agriculture Commissioner in 1998 (De Leon). The 1994 primary included one Hispanic and two Anglo candidates, the 1994 runoff included one Hispanic and one Anglo candidate, the 1996 primary included one Hispanic and three

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[4] For Bexar, Cameron, El Paso, Hidalgo, and Neuces counties, which have limited black populations, the analysis reports only Hispanic and Anglo voting. For Dallas, Harris, Tarrant, and Travis counties, the analysis reports Hispanic, African-American, and Anglo voting.

Anglo candidates, the runoff included one Hispanic and one Anglo candidate, and the 1998 primary included one Hispanic and one Anglo candidate. Table 2 reports results for the 1998 primary election for Attorney General that included one African-American (Overstreet) and two Anglo candidates. The results of analysis for this election are reported only for Dallas, Harris, Tarrant, and Travis Counties, given the small proportion of blacks in the other counties examined.

Table 1
Ecological Regression Analysis
Mean Vote for Candidates
Hispanic, Black, and Anglo Voters
Nine Counties and Congressional District 28
5 Statewide Primary Elections*

	% of Hispanic Voters for Hispanic Candidates	% of Black Voters for Hispanic Candidates	% of Anglo Voters for Hispanic Candidates
Bexar County	76%	NA	25%
Cameron County	74%	NA	25%
Dallas County	56%	31%	35%
El Paso County	73%	NA	31%
Harris County	71%	30%	27%
Hidalgo County	71%	NA	52%

Nueces County	71%	NA	27%
Tarrant County	62%	27%	30%
Travis County	78%	43%	38%
Congressional District 28	77%	NA	9%
Mean All Elections	**71%**	**33%**	**30%**

* 1998 Agriculture Commissioner Primary, 1996 US Senate Primary and Runoff, 1994 Supreme Court Primary and Runoff.

Table 2

Ecological Regression Analysis
Vote for Black Candidate Overstreet in
1998 Democratic Primary for Attorney General

	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate
Dallas County	0%	66%	8%
Harris County	0%	67%	0%
Tarrant County	NA	76%	0%

Travis County	0%	80%	23%
Mean	**0%**	**72%**	**8%**

9. The results reported in Table 1 and Table 2 confirm the pattern of racially polarized voting disclosed in my 1994 report on primary elections. For the large counties and previous CD 28, Table 1 discloses a cohesive Hispanic electorate that usually united behind Hispanic candidates and, in turn, a cohesive Anglo electorate that usually united against Hispanic candidates. Likewise, results reported in Table 2 disclose a cohesive African-American

electorate that usually united behind the African-American candidate. In turn, the results reported in Table 2 disclose a cohesive Anglo electorate that solidly bloc voted against the African-American candidate in the only counties studied.

10. Additional confirmation of minority voter cohesion and Anglo bloc voting in primary elections is provided in Table 3, which analyzes minimally competitive Democratic primary elections for state representative, state senator, and U.S. Representative identified by the Texas Legislative Council as involving minority and Anglo candidates from 1994 to 2000.[5] Table 3 includes 27 legislative elections with Hispanic candidates and 7 legislative elections with black candidates. In elections with Hispanic candidates, Table 3 reveals that a mean of 61 percent of Hispanic voters are estimated to have supported the Hispanic candidates, compared to a mean of 18 percent of Anglo votes. In

[5] A "minimally competitive" election is one where the losing candidate receives at least 15 percent of the vote.

elections with black candidates, Table 3 discloses that a mean of 72 percent of African-American voters are estimated to have supported the African-American candidates, compared to a mean of 21 percent of Anglo voters.

11. For general elections, Table 4 reports the results of analysis for six statewide elections in nine counties. The elections studied include the five Anglo-versus-minority statewide general elections from 1994 to 2000. In four of these elections, Hispanic Democrats competed against Anglo Republicans. In one election – for Railroad Commissioner in 1998 – an Anglo Democrat competed against a Hispanic Republican. Given that there were no multiracial statewide general elections in 2000, the analysis includes for that year the election for Court of Criminal Appeals Place 8, in which an Anglo Democrat competed against an Anglo Republican. There were no black-versus-Anglo statewide general elections during this period.

Table 4
Ecological Regression Estimates
Mean Vote for Democratic Candidate
Hispanic, Black, Anglo Voters
9 Counties, 6 General Elections

	% of Hispanic Voters for Democratic Candidate	% of Black Voters for Democratic Candidate	% of Anglo Voters for Democratic Candidate
Bexar County	98%	NA	20%
Cameron County	84%	NA	19%

Dallas County	100%	100%	25%
El Paso County	88%	NA	26%
Harris County	99%	100%	23%
Hildago County	86%	NA	32%
Nueces County	92%	NA	16%
Tarrant County	100%	100%	27%
Travis County	97%	99%	43%
Mean All Elections	**94%**	**100%**	**26%**

* 2000 Court of Criminal Appeals Place 8, 1998 Land Commission and Railroad Commission, 1996 US Senate and Railroad Commission, 1994 Attorney General.

12. The results reported in Table 4 disclose that both Hispanic and black voters were usually cohesive in support of Democratic candidates in general elections, whereas Anglo voters were usually cohesive in support of Republican candidates. Regardless of the racial identities of the

Table 3
Ecological Regression Estimates of Hispanic, Black, and Anglo Voting
Anglo v. Minority Democratic Primary Elections
Congressional, Representative, and Senate Districts, 1994-2000

Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
2000 Primary									
Congressional District 23 Anglo/Hispanic	80	NA	0	-	-	-	20	NA	100
House District 43 Anglo/Hispanic	45	NA	0	-	-	-	55	NA	100
House District 101 Anglo/Hispanic	46	NA	30	-	-	-	54	NA	70
Senate District 26 Anglo/Hispanic	56	NA	50	-	-	-	44	NA	50

Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
1998 Primary									
Congressional District 23 Anglo/Hispanic	58	NA	0	-	-	-	42	NA	100
House District 30 Anglo/Black	-	-	-	70	100	26	30	0	74
House District 54 Anglo/Hispanic	50	NA	15	-	-	-	50	NA	85
House District 75 Anglo/Hispanic	83	NA	35	-	-	-	17	NA	65
1998 Runoff									
Congressional District 23 Anglo/Hispanic	62	NA	7	-	-	-	38	NA	93
House District 54 Anglo/Hispanic	71	NA	0	-	-	-	29	NA	100
1996 Primary									

Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
Congressional District 5 Anglo/Black	-	-	-	NA	68	31	NA	32	69
Congressional District 15 Anglo/Hispanic	77	NA	38	-	-	-	23	NA	62
Congressional District 23 Anglo/Hispanic	39	NA	45	-	-	-	61	NA	55
Congressional District 29 Anglo/Hispanic	46	NA	0	-	-	-	54	NA	100
House District 27 Anglo/Hispanic	63	71	14	-	-	-	37	29	86
House District 51 Anglo/Hispanic	92	NA	15	-	-	-	8	NA	85
House District 77 Anglo/Hispanic	73	NA	26	-	-	-	27	NA	74
House District 90	74	25	29	0	56	0	26	19	71

Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
Anglo/Hispanic/Black									
Senate District 29 Anglo/Hispanic	74	NA	15	-	-	-	26	NA	85
Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
1996 Runoff									
Congressional District 15 Anglo/Hispanic	56	NA	30	-	-	-	46	NA	65
Congressional District 23 Anglo/Hispanic	54	NA	40	-	-	-	46	NA	65
House District 90 Anglo/Hispanic	59	48	16	-	-	-	41	52	84

Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
Senate District Anglo/Hispanic	52	NA	17	-	-	-	48	NA	83
1994 Primary									
Congressional District 25 Anglo/Black	-	-	-	NA	63	7	NA	37	93
Congressional District 29 Anglo/Hispanic	55	NA	0	-	-	-	45	NA	100
House District 31 Anglo/Hispanic	64	NA	0	-	-	-	36	NA	100
House District 37 Anglo/Hispanic	66	61	64	-	-	-	34	39	36
House District 43 Anglo/Hispanic	66	NA	2	-	-	-	34	NA	98
House District 50 Anglo/Black	-	-	-	93	100	67	7	0	33
House District 90	35	9	0	0	46	0	65	44	100

Year & Election District & Races of Candidates	% of Hispanic Voters for Hispanic Candidate	% of Black Voters for Hispanic Candidate	% of Anglo Voters for Hispanic Candidate	% of Hispanic Voters for Black Candidate	% of Black Voters for Black Candidate	% of Anglo Voters for Black Candidate	% of Hispanic Voters for Anglo Candidate	% of Black Voters for Anglo Candidate	% of Anglo Voters for Anglo Candidate
Anglo/Hispanic/Black									
House District 140 Anglo/Hispanic	47	NA	0	-	-	-	53	NA	100
1994 Runoff									
Congressional District 25 Anglo/Black	-	-	-	NA	74	13	NA	26	87
Mean	**61**	**43**	**18**	**41**	**72**	**21**	**38**	**28**	**80**

Republicans and Democrats competing in these six elections, in every contest in every county, both Hispanics and African-Americans voted overwhelmingly for the Democratic candidates. Likewise, in the universe of elections and counties studied, Anglo voters usually united behind the Republican candidates in general elections.

13. In sum, the analysis of both primary and general elections for a range of federal and state legislative elections, as well as state executive and judicial contests, across regions of the state of Texas through 2000, discloses a clear pattern of minority voter cohesion and Anglo bloc voting in both primary and general elections. Taken together, the cohesion of the Hispanic electorate and of the African-American electorate and the bloc voting of the Anglo electorate result in a pattern of polarized voting in Texas.

14. These findings, updated through 2000, were confirmed by the testimony of other expert witnesses in the 2001 litigation, including experts for Republican Party interests and the State of Texas. There was broad agreement among expert witnesses testifying on congressional redistricting following the 2000 Census that voting is polarized along racial lines in the state of Texas, with minorities usually cohesive in support of candidates of their choice and Anglos usually bloc voting against the minority candidates of choice. Most of the experts used the methodology of ecological regression to study racially polarized voting. Dr. Lisa Handley, the expert for Lt. Governor Ratliff, concluded, "after reviewing tables summarizing estimates of voting patterns by race/ethnicity in eight Texas counties, I have concluded that voting in at least these areas of Texas is racially polarized." Dr. Handley indicated that "the counties . . . in the summary tables

included the six largest counties in the state – Bexar, Dallas, El Paso, Harris, Tarrant, and Travis."[6] All of the analyses in the counties were based on the ecological regression methodology. Dr. Thomas L. Brunell, expert for the Associated Republicans of Texas, used ecological regression to conduct a "set of analyses to determine whether racial bloc voting exists among the communities in the 11 minority districts" in the Associated Republicans' plan.[7] He concluded that his analyses "demonstrate the presence of racially polarized voting on the part of whites, as well as Hispanics and African-Americans."[8] Dr. Richard Engstrom, the expert for American GI Forum and individual Hispanic intervenors, examined several primary and general elections involving Hispanic candidates from 1992 to 1998 "in 63 contiguous counties in the southern portion of Texas."[9] These counties contained 48 percent of the Hispanic residents of voting age in Texas. Dr. Engstrom concluded that his analyses of general elections "reveal 'polarized voting,' as defined by the United States Supreme Court in *Thornburg v. Gingles*, (at 53 n.21). Hispanic voters and non-Hispanic voters did not share the same candidate preferences in any of these seven elections."[10] Dr. Engstrom found that, in three of four primary elections examined, "Hispanic and non-Hispanic voters were divided in their candidate preferences."[11] Dr. Jonathan Katz, expert for the state-court

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[6] Lisa Handley, "An Examination of Proposed Congressional Plan LTG01017C," p. 4.

[7] "Expert Report of Thomas L. Brunell," August 27, 2001, p. 5.

[8] *Ibid.*, p. 61.

[9] "Expert Report by Richard L. Engstrom," August 27, 2001, p. 4.

[10] *Ibid.*, p. 10.

[11] *Ibid.*, pp. 12-13.

plaintiffs and Democratic congressional intervenors, using an alternative methodology termed "ecological inference," reached similar conclusions. He examined every general election for Congress, from 1992 to 2000, in all districts with black and/or Hispanic populations above the statewide average. He found a virtually universal pattern of racially polarized voting, with Hispanic and black voters strongly preferring to support Democratic candidates in congressional elections and Anglo voters strongly preferring to support Republican candidates: Katz found "that every district with higher than average Hispanic or black populations displays statistically significant racial bloc voting. . . . [B]lack and Hispanic voters overwhelmingly support Democratic and non-Anglo candidates, with typical support levels of greater than 70% and often as high as 90%, whereas majorities of Anglos in most districts vote for Republican and Anglo candidates."[12]

15. Dr. John Alford, expert for the Texas Governor and Secretary of State, conducted an ecological regression analysis of seven multiracial general and primary elections in 11 majority-minority congressional districts created in the State's proposed Plan 1044C that included a substantial majority of the state's Hispanic and African-American voting-age populations ("VAP"). He found that, in general elections, black and Hispanic voters "typically vote cohesively in support of black and Hispanic Democratic candidates" and that Anglos "typically vote cohesively for the Republican opponents of minority candidates." In primary elections, he found that African-Americans "typically vote cohesively in support of black candidates," that "Hispanics typically vote cohesively in support of

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[12] Jonathan N. Katz, "Report on Texas Congressional Redistricting: Minority Opportunities and Partisan Fairness," August 27, 2001, p. 1.

Hispanic candidates," and that Anglo voters do not typically vote cohesively for either black or Hispanic candidates.[13]

16. I have now updated these analyses of racially polarized voting with 2002 contests for areas of the state that are the focus of analyses presented below. Such updating, as will be demonstrated below, generally shows a continuing pattern of racially polarized voting.

17. The State of Texas in its 20 October 2003 submission of Plan 1374C to the United States Department of Justice, in a document by Andy Taylor called "Voting Rights Analysis," acknowledged the existence across the State of a usual pattern of racially polarized voting in primary and general elections, including minority voter cohesion and Anglo bloc voting against the candidates of choice of minority voters. In particular, the State's submission cites as a reliable and accurate description of racially polarized voting in Texas the following findings from Dr. Alford's "expert report for the State of Texas from the *Del Rio* trial," which, like this report, also uses ecological regression analysis to study voting in Texas elections:

> ... Overall, the regression results conform to a well-established pattern. In general elections, black and Hispanic voters (disproportionately Democrats) typically vote cohesively in support of black and Hispanic Democratic candidates. Anglos (disproportionately Republican) typically vote cohesively for the Republican opponents of these minority candidates, although the proportion of Anglo crossover votes rises as

[13] Report of John Alford, p. 9.

> the proportion of Anglo Democrats in a district rises.
>
> In Democratic primary elections, blacks typically vote cohesively in support of black candidates, while Hispanic and Anglo voters typically do not cohesively support black candidates at this level. Similarly, Hispanics typically vote cohesively in support of Hispanic candidates, while black and Anglo voters typically do not cohesively support Hispanic candidates at this level. [14]

On that same page of their submission, the State of Texas also cites in support of the finding of racially polarized voting, my testimony on black, Hispanic, and Anglo voting from the *Balderas* trial (p. 8, footnote 19).

18. This racial polarization has taken place in a diverse state that includes substantial minority populations. Table 5 reports the population percentages of Anglos, blacks, and Hispanics in Texas, using total population, voting-age population (VAP), citizen total population, and citizen voting-age population (CVAP). It also translates these percentages into the proportional numbers of districts in a 32-district congressional plan. The data in Table 5 indicate that the proportional share of districts for African-Americans ranges from just under 4 districts to just over 4 districts and the proportional share of districts for Hispanics ranges from 7.4 to 10.6 districts. Using citizen voting-age data, proportionality for blacks is 4.0 districts and proportionality for Hispanics is 7.4 districts.

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[14] "Voting Rights Analysis," p. 8. This submission letter is included as Appendix 2 of this report.

III. African-American Voter Opportunities

A. Proposed Plan 1374C Has the Effect of Diluting Black Voter Opportunities in the Dallas/Tarrant County Region.

19. Analysis of Plan 1374C in the Dallas/Tarrant County area demonstrates the three basic requisites for diminishing black voters' opportunities to participate fully in the political process and to elect candidates of their choice: usual patterns of cohesion by minority voters, white bloc voting that usually defeats minority candidates of choice, and the possibility of creating an additional effective minority opportunity district. Patterns of black voter cohesion in the Dallas/Tarrant region for both primary and general elections are demonstrated by the various analyses included in this report. In primary elections, Table 2 reveals that a mean of 71 percent of black voters in Dallas and Tarrant Counties are estimated to have supported the black candidate in the statewide Democratic primary for Attorney General in 1998. An updated analysis of primary elections is also provided in Table 6, which examines two 2002 Anglo-versus-black Democratic primaries: for U.S. Senate – which included black candidate Kirk, Hispanic candidate Morales, and two Anglo candidates – and for Court of Criminal Appeals Place 2 – which included black candidate Whittier and one Anglo candidate. These elections are examined in Table 6 for Dallas and Tarrant Counties combined. Table 6 also includes an analysis of the 2002 runoff election for U.S. Senate which included black candidate Kirk and Hispanic candidate Morales. The results for the U.S. Senate primary confirm the strong patterns of cohesion found in Dallas/Tarrant Counties for the 1998 Attorney General primary, with the overwhelming majority of black voters voting for the black candidate. Likewise in competition with a Hispanic

candidate in the primary, Kirk again wins near unanimous support from black voters. Such cohesion does not, however, emerge for the Court of Criminal Appeals primary, which included black candidate Whittier. This black candidate, however, was rejected by both black and non-black voters across the state of Texas. In general elections, Table 4 discloses that for the period from 1994 to 2000, in both Dallas and Tarrant Counties, black voters are estimated to have provided near unanimous support for Democratic candidates. Identical findings are reported in Dallas/Tarrant Counties for the 2002 general election for U.S. Senate that included black candidate Kirk and Anglo candidate Cornyn. Kirk won near-unanimous support for the combined minority population of Dallas and Tarrant Counties.

Table 6

Ecological Regression Analysis
Racial Bloc Voting in 2002
Primary, Runoff, and General Elections
Dallas and Tarrant Counties Combined

Primary Elections			
	Percent for Black Candidate	**Percent for Anglo Candidate(s)**	**Percent for Hispanic Candidate**
US Senate Black Candidate Kirk Hispanic Candidate Morales			
Anglo Voters	39%	33%	28%
Black Voters	99%	1%	0%
Hispanic Voters	0%	10%	90%
Court of Criminal Appeal, Place 8 Black Candidate Whittier			
Anglo Voters	32%	68%	NA
Black Voters	40%	60%	NA

Hispanic Voters	13%	87%	NA
Runoff Elections			
	Percent for Black Candidate		**Percent for Hispanic Candidate**
US Senate Black Candidate Kirk Hispanic Candidate Morales			
Anglo Voters	48%		52%
Black Voters	98%		2%
Hispanic Voters	0%		100%
General Elections			
	Percent for Democratic Candidate	**Percent for Republican Candidate**	
US Senate Black Candidate Kirk			
Anglo Voters	32%	68%	
Black Voters	100%	0%	
Hispanic Voters	100%	0%	

20. Analysis additionally demonstrates that in both primary and general elections, Anglos bloc voted in the Dallas/Tarrant region against the candidates of choice of black voters. In primary elections, Table 2 reveals that fewer than 10 percent of Anglo voters in either Dallas or Tarrant Counties supported the black candidate in the 1998 statewide Democratic primary for Attorney General. Confirmation of Anglo bloc voting is also found in the 2002 results for Dallas and Tarrant Counties which show less than 40 percent Anglo support for black candidates in the two Anglo-versus-black primaries studied. In the 2002 runoff election against a Hispanic candidate, the black candidate Kirk wins slightly less than half the Anglo vote. Anglo bloc voting usually prevailed in general elections as well. Table 4 demonstrates that a mean of 26 percent of Anglo voters supported Democratic candidates in general elections from 1996 to 2000. In the 2002 general election for U.S. Senate, Table 6 indicates that in Dallas and Tarrant Counties 32 percent of Anglo voters are estimated to have voted for the black Democratic candidate for Senate in the 2002 general election.

21. Additional indication of racial bloc voting in general elections in the Dallas/Tarrant area is provided by an analysis of the 2002 general election for Congress in current CD 24, in which Anglo Democratic incumbent Frost competed against Hispanic Republican challenger Ortega. As indicated by the ecological regression estimates reported in Table 7, Frost lost the Anglo vote in the general election, but secured overwhelming support from all minority voters, including black and Hispanic voters, and prevailed with 66 percent of the overall vote.

Table 7

Ecological Regression Estimates
Racial Bloc Voting in Congressional District 24 in 2002
General Election for Congress

	Percent for Democratic Candidate Frost (Anglo)	Percent for Republican Candidate Ortega (Hispanic)
2002 General		
Anglo Voters	41%	59%
Black Voters	100%	0%
Hispanic Voters	100%	0%
All Voters	66%	34%

22. Analysis additionally demonstrates that it is possible to create an additional black opportunity district in the Dallas/Tarrant area, as indicated by Congressional District 24 in the current court-drawn Plan 1151C. According to the 2000 Census, CD 24 under the current plan is a majority-minority district. Its population is 22.7 percent black and 38.0 percent Hispanic, with a combined black and Hispanic population of 60.2 percent and a combined minority population (black, Hispanic, Asian, and others) of 64.7

percent. Its voting-age population is 21.4 percent black and 33.6 percent Hispanic, with a combined black and Hispanic voting-age population of 54.6 percent and a combined minority voting-age population of 59.3 percent. Its citizen voting-age population is 25.9 percent black and 20.8 percent Hispanic with a combined black and Hispanic citizen voting-age population of 46.4 percent and a combined minority citizen voting-age population of 50.1 percent.

23. Although blacks alone are not a citizen voting-age population majority, Congressional District 24 under Plan 1151C is nonetheless an effective black opportunity district under the Voting Rights Act. Black voters have more than equal opportunity to elect candidates of their choice in Democratic primary elections in CD 24 under Plan 1151C, and the district is more than sufficiently Democratic to elect Democratic nominees to public office. The district is thus quite comparable to the undisputed black opportunity districts under the current plan – District 18 in Houston and District 30 in Dallas – which also lack a black majority of the citizen voting-age population. Similarly CD 9 in the Houston area in proposed Plan 1374C, which the State of Texas in its Section 5 submission alleges is an effective minority opportunity district, lacks a black citizen voting-age majority. None of this should be surprising. To assess the viability of a district for black voters, it is necessary to examine voting patterns in primary and general elections and not to rely on demographic information alone. In its landmark 1986 decision in *Thornburg v. Gingles*, the Supreme Court noted that minority opportunities should be assessed through "searching practical evaluation of the past and present reality, . . . [and] whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case . . . and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms."

Table 5

Population Percentages of Demographic Groups
Corresponding Number of Districts
32 District Plan

	Total Population		Voting-Age Population		Citizen Population		Citizen Voting-Age Population	
	Percent	# of Districts	Percent	# of Districts	Percent	# of Districts	Percent	# of Districts
Anglo	54.6	17.5	58.7	18.8	59.1	18.9	64.4	20.6
Black	12.4	4.0	11.7	3.7	13.2	4.2	12.6	4.0
Hispanic	33.1	10.6	29.7	9.5	27.8	8.9	23.0	7.4

24. African-Americans in current CD 24 constitute majorities of the electorate in Democratic and primary runoff elections within the district. This is a consequence of low Hispanic turnout and Anglo participation in Republican primaries, the same mechanisms that establish, for example, Districts 18 and 30 as effective black opportunity districts. As indicated in Table 8, from 1996 to 2002, black voters comprised a mean of 64 percent of Democratic primary voters within current CD 24 and 59 percent of the Democratic runoff voters within the district.

Table 8

Primary and Runoff Percentage of African-Americans Among Voters
Current Congressional District 24
Democratic Primary and Runoff Elections
1996-2002

	Percent African-American of Electorate					
	1996	**1998**	**2000**	**2002**	**Mean 1996-2002**	**Mean 2000-2002**
Primary	66%	53%	72%	63%	64%	68%
Runoff	51%	NA	55%	70%	59%	63%
Based on U.S. Senate elections, 1996 & 2002, Attorney General 1998, and President 2000						

During the two most recent elections – 2000 and 2002 – African-Americans comprised a mean of 68 percent of Democratic primary voters within current CD 24 and a mean

of 63 percent of Democratic runoff voters within this district. Current CD 24 is also sufficiently Democratic in general elections that an African-American candidate of choice nominated in a Democratic primary contest would have an excellent opportunity for election to office, winning overwhelming support from blacks and Hispanics as indicated above as well as some support from Anglo voters. As indicated in Table 9, Democratic general-election candidates for statewide office in Texas won a mean of the two-party vote of 55.3 percent from 1996 to 2002 in current CD 24. In the two most recent elections – 2000 and 2002 – Democratic candidates received a mean two-party vote of 56.1 percent in current CD 24.

Table 9
Mean Democratic Percent of Two-Party Vote for Statewide General Elections
Current Congressional District 24
1996-2002

Percent Democratic, Two-Party Vote					
1996	**1998**	**2000**	**2002**	**Mean 1996-2002**	**Mean 2000-2002**
55.4%	53.6%	54.0%	58.1%	55.3%	56.1%

25. Only statewide election results, not congressional election returns, provide a consistent, common basis for assessing the partisan composition of current, past, and proposed congressional districts. Congressional elections are comprised of 32 separate elections in districts across the state that cannot reliably be combined or compared. Some

congressional elections include incumbents, some do not. Some congressional elections are closely contested, others are only lightly contested, and many are not contested at all. The use of statewide elections in preference to congressional elections as a gauge of performance of congressional districts was confirmed by Dr. Keith Gaddie, Professor of Political Science at the University of Oklahoma, who testified before the Senate Committee on Jurisprudence after being hired as a consultant to the Texas Attorney General to "evaluate and assess" the legal implications of alternative plans. According to Dr. Gaddie's Senate testimony, "As Professor Lichtman pointed out, one of the problems we run into in recrafting districts is we remove the incumbents from the equation and congressional elections become a bit difficult to use to baseline change. So we rely on statewide contests in order to conduct analyses and make inferences regarding the effects of change."[15]

26. The opportunities for black voters to nominate candidates of their choice in Democratic primaries in current CD 24 are illustrated by three 2002 elections involving black candidate Kirk. As a reflection of African-American control over the primary and runoff elections, Kirk easily prevailed in each election within the boundaries of current CD 24, with 66 percent of the primary vote and 75 percent of the runoff vote. Given the overwhelming black support for Kirk, as indicated in Table 6, and the large black turnout majorities reported in Table 8, Kirk would easily have prevailed in the primary and runoff elections within CD 24 without a single Anglo or Hispanic vote. In the general election, reflecting

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[15] Committee Archives, 77th Legislature, Senate Jurisprudence Committee, July 22, 2003, http//www.senate.state.tx.us/75r/sehate/commit/c550/c550.htm#Arch

the Democratic electorate in current CD 24, Kirk won 60 percent of the vote.

27. Thus CD 24 under the current plan demonstrates how, in Texas, African-American voters can have effective opportunities to elect candidates of their choice to office despite lacking population majorities or even pluralities in legislative districts. As a consequence of low Hispanic turnout and Anglo participation in Republican contests, African-Americans control the Democratic primary contests in CD 24 and their nominees of choice are able to win election through solid minority support and some cross-over voting from Anglo Democrats in general elections. Dr. Gaddie, the Attorney General's consultant, confirmed in his Senate testimony that CD 24 under Plan 1151C is an effective opportunity district for black voters in both primary and general elections. In his words, "Black voters do control the primary in District 24 and the candidate of choice usually prevails." [16]

28. Plan 1374C includes no Dallas/Tarrant district comparable to CD 24 in Plan 1151C. To the contrary, as indicated in Table 10, the black voters of CD 24 in Plan 1151 are fragmented or "cracked" and placed in five districts overwhelmingly dominated by Anglo Republicans. The ratio of Anglos of voting age to blacks of voting age in these five districts ranges from 4.6 to 12.3. All five districts are under 40 percent Democratic as measured by recent statewide elections. Four of the five districts include Republican incumbents; one is an open seat under 1374C, with nearly a 70 percent Republican majority based on statewide elections. African-Americans in these districts have no opportunity to elect candidates of their choice to Congress. Such

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[16] *Ibid.*, note 15.

fragmentation of minority communities and their submergence within Anglo-dominated districts constitutes the most familiar way in which district lines are drawn to impede the opportunities for minority voters to participate fully in the political process and to elect candidates of their choice.

29. The presence of Anglo incumbent Frost in current CD 24 does not affect the identification of this district as an effective opportunity district for black voters. Opportunities in legislative districts are measured relative to the race of the voter, not the race of candidates and representatives. As illustrated by Frost's victory over Hispanic candidate Ortega in the 2002 general election, with Frost overwhelmingly winning the Hispanic vote, Anglos as well as minorities may be candidates of choice of minority voters. Moreover, as indicated in Table 11, in Representative Frost, black voters have a Member of Congress who shares their common interests, whereas in their new Republican districts, black voters will almost certainly be represented by Anglo Republicans who do not share those interests. According to data in Table 11, Representative Frost had a rating of 94 percent on his voting record from the NAACP, comparable to the mean rating of 91.5 percent for the two African-American Members of Congress elected from Texas. In contrast, the mean rating for Anglo Republicans in Texas is 24.8 percent, with similar ratings for the GOP incumbents in districts including the black population from current CD 24. Indeed, the highest score for any Texas Republican is 39 percent.

Table 11

NAACP Scores for Texas Congressional Delegation

	NAACP Scores 2001-2002
Rep. Frost	**94%**
Black Democrats	91.5%
Hispanic Democrats	88.8%

Anglo Democrats	75.4%
Rep. Barton	33%
Anglo Republicans	24.8%
Hispanic Republican	22%
Rep. Granger	22%
Rep. Sessions	22%
Rep. Burgess	NA
Source: NAACP Legislative Scorecard, 107th Congress, 2nd Session	

B. The Fragmentation of African-Americans in the Area of Current District 24 Is Intended to Deny Black Voters the Opportunity to Participate Fully in the Political Process and to Elect Candidates of Their Choice to Congress

30. Plan 1374C in the Dallas/Tarrant area is clearly drawn with the discriminatory intent of fragmenting black voter strength so that a cohesive black electorate will be denied the opportunity to participate fully in the political process and to elect representatives of its choice. This intent is evident through analyses of maps showing the deliberate placement of African-Americans in Anglo, Republican-dominated districts (all but one of which has an Anglo Republican incumbent) in which they would lack significant influence over congressional elections and would be represented by Members of Congress who do not share their interests. This racially driven districting scheme cannot be justified by such traditional nonracial goals of redistricting as geographic compactness, preservation of communities of interest, protection of influential incumbents, maintenance of

cores of existing districts, or minimization of jurisdictional splits. To the contrary, Plan 1374C deliberately subordinates these goals to the overriding objective of discriminatory racial fragmentation. In addition to this conclusive circumstantial evidence – the same kind of evidence that has supported a finding of intentional race-based redistricting in numerous racial gerrymandering cases under the *Shaw v. Reno* doctrine – documentary evidence also supports racial intent in the drawing of Plan 1374C in the Dallas/Tarrant region.

Congressional District 24

31. As indicated in Table 10, under Plan 1374C, CD 24 retains only 22.6 percent of the black population contained within this district under current Plan 1151C. It is also transformed from a Democratic district with a Democratic incumbent to a nearly 70 percent Republican open-seat district. Yet rather than improving the geographic compactness of this district as is usually the case when the minority population of a district is decreased, changes in CD 24 under Plan 1374C have produced a less compact district as shown in Table 12.

Table 10

Fragmentation of African-American Population from Current Congressional District 24 to New Districts in Proposed Plan 1374C

	Districts Under Plan 1374C				
	Congressional District 6	**Congressional District 12**	**Congressional District 24**	**Congressional District 26**	**Congressional District 32**
# of Black Persons From Current Congressional District 24 in New District	22,208	2,731		79,170	10,122

% of Black Persons From Current Congressional District 24 in New District	15.1%	1.9%	22.6%	53.7%	6.9%
% Anglo VAP in New District	69.0%	70.2%	67.1%	68.9%	55.1%
% Black VAP in New District	12.3%	5.7%	9.3%	15.0%	7.8%
Ratio of Anglo to Black VAP in District	5.6	12.3	7.2	4.6	7.1

Mean Democratic Two-Party Vote in New District, Statewide Elections, 1996-2002	36.8%	39.0%	31.4%	39.9%	34.3%
Mean Democratic Two-Party Vote in New District, Statewide Elections, 2000-2002	35.2%	36.7%	31.7%	37.6%	35.1%
Incumbent Placement in District	Barton (R) Turner (D) Frost (D)	Granger (R)	Open	Burgess (R)	Sessions (R)

Table 12

Dallas/Tarrant Districts Under Plan 1374C Incorporating at Least 10,000 Black Persons from Congressional District 24 Under Plan 1151C Comparison of Compactness Measures With Districts Under Plan 1151C*

	Plan 1151C Perimeter to Area	Plan 1374C Perimeter to Area	Plan 1151C Smallest Circle	Plan 1374C Smallest Circle
Congressional District 6	2.8	7.2	1.9	4.4
Congressional District 24	6.1	7.5	3.1	3.4
Congressional District 26	2.7	6.7	1.8	5.2
Congressional District 32	3.0	8.9	2.3	2.9
Mean	**3.7**	**7.6**	**2.3**	**4.0**

* Congressional District 12 incorporates fewer than 3,000 black persons from Congressional District 24, too few to have a discernable impact on the district.

Source: *Texas Legislative Council, Report Package.* As indicated by the Council: Each measure is reported on a scale of 1 or greater, **with lower numbers being more compact.**

This Table reports results for the two standard district compactness scores that the Texas Legislative Council computes: the "perimeter to area" score, which measures mainly irregularities in the boundaries of districts; and the "smallest circle" score, which measures mainly the geographic dispersion of districts. The lower the value of these scores – down to a minimum of 1 – the more compact the district. For CD 24 under Plan 1374C, as compared to CD 24 under Plan 1151C, its perimeter-to-area score rises from 6.1 to 7.5 and its smallest-circle score rises from 3.1 to 3.4.

Congressional District 26

32. As indicated in Table 10, as part of the cracking of the black population concentration in current CD 24, 79,170 African-Americans from this district – 53.7 percent of its black population – are reallocated into CD 26 under Plan 1374C. As also indicated in Table 10, they are placed into a district with a Republican incumbent, dominated by Anglos who vote so solidly Republican that the district remains above 60 percent Republican in statewide averages despite this large infusion of solidly Democratic black voters – exemplifying the fragmentation of minority voters and their submergence in an Anglo-controlled district. To incorporate the black population from CD 24, the line drawers extended a long finger southward from the core of proposed CD 26 deep into Tarrant County. The boundary of this finger was clearly drawn based on racial data, with the most heavily black precincts consistently included in this extension of proposed

CD 26. Moreover, CD 26 under Plan 1374C cuts through Cooke County to pick up Anglo Republican voters stretching all the way to the Oklahoma border. As is evident both from the maps in Appendix 3 to this report and from the compactness scores in Table 12, CD 26 is decidedly less compact under Plan 1374C than under Plan 1151C. For CD 26 under Plan 1374C, as compared to CD 26 under Plan 1151C, its perimeter-to-area score more than doubles, rising from 2.7 to 6.7, and its smallest-circle score nearly triples, increasing from 1.8 to 5.2.

Congressional District 32

33. According to Table 10, about 10,000 African-Americans from CD 24 under Plan 1151C are split off and placed into CD 32 under Plan 1374C. As the maps in Appendix 3 of this report indicate, to achieve this fragmentation, the crafters of Plan 1374C contorted the previously compact CD 32 to coil like a snake around CD 30. As is evident from inspection of the maps and the compactness scores in Table 12, CD 32 is far less compact under Plan 1374C than under Plan 1151C. For CD 32 under Plan 1374C, as compared to CD 32 under Plan 1151C, its perimeter-to-area score approximately triples, rising from 3.0 to 8.9, and its smallest-circle score increases from 2.3 to 2.9.

Congressional District 6

34. As indicated in Table 10, the remaining concentration of African-Americans from CD 24 – 22,208 persons – are primarily reallocated to CD 6 under Plan 1374C. To achieve this fragmentation, the line drawers created a saw-toothed extension of CD 6 into Tarrant County. As indicated by inspection of the maps and the compactness scores in Table 12, CD 6 is far less compact under Plan 1374C than under Plan 1151C. Both of its compactness scores more than

double: the perimeter-to-area score rises from 2.8 to 7.2, and the smallest-circle score from 1.9 to 4.4.

35. The sacrifice of geographic compactness in order to crack and submerge African-American voters in Plan 1374C is also demonstrated by comparing mean compactness scores for all four districts in Plan 1374C gaining significant black population from current CD 24. As reported in Table 12, the mean compactness scores for these four districts deteriorate in Plan 1374C, as compared to Plan 1151C. The mean perimeter-to-area score for the four districts more than doubled from Plan 1151C to Plan 1374C, rising from 3.7 to 7.6. The mean smallest-circle score nearly doubled, rising from 2.3 to 4.6.

36. This subordination of geographic compactness to the fragmentation of black population cannot be justified by reference to other traditional redistricting goals: preservation of communities of interests, maintenance of cores of existing districts, protecting influential incumbents, or preserving jurisdictional lines. Plan 1374C strikingly undermines the preservation of communities of interest by reallocating urban blacks from the Dallas/Ft. Worth Metroplex into districts dominated by suburban and even rural Anglos. As an editorial in the *Fort Worth Star-Telegram* noted on 10 October 2003, "East and southeast Fort Worth are shoved into a district dominated by affluent suburbs and Denton County and extending to the Oklahoma border. This abuse of low-income, minority voters alone should cause courts to reject the map."[17] Plan 1374C also disrupts the core of existing districts. As indicated in Table 13, for the four congressional districts listed in Table 12 above, the mean

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[17] Editorial Board, "No Applause Lines," *Fort Worth Star-Telegram*, 10 October 2003.

core retention is 49 percent. This means that more than 1.3 million constituents in just four congressional districts have been reallocated to new districts under Plan 1374C.

37. Plan 1374C additionally disregards the goal of protecting incumbents with seniority and clout, irrespective of party. Rather, the plan targets for defeat one of the most senior and influential members of the Texas delegation: Democrat Martin Frost of CD 24, first elected to Congress in 1978. According to *Congressional Quarterly*, "Frost also courts his own constituency with work on projects near and dear to them. . . . [Frost bargained for a deal] that allowed defense contractor Northrop Grumman Corp. to maintain two plants it had considered moving from Frost's district. He also has lobbied for funds to widen Interstate 30, a crucial Texas traffic artery, and for the Dallas area's light-rail system."[18] Plan 1374C removes Frost's home from CD 24, which is converted into a nearly 70 percent Republican district, and places it in another heavily Republican district, CD 6, where he is paired with fellow Democratic incumbent Turner and Republican incumbent Barton. CD 6 under Plan 1374C includes 66.4 percent of Barton's previous district, but only 4.4 percent of Turner's previous district and 21.6 percent of Frost's previous district. Finally, with respect to preservation of jurisdictional lines, Plan 1374C has a mixed record in comparison with current Plan 1151C. The four relevant districts in Plan 1374C split more counties than they do in Plan 1151C; however, they split fewer municipalities.

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[18] Congressional Quarterly, *Politics in America, 2004*, 999.

Table 13

Core Retention of Dallas/Tarrant Area Districts With a Minimum of 10,000 Black Population from Current District 24

District Under Plan 1151C	Percent of Core Retained in Plan 1374C
District 6	66.4%
District 24	26.5%
District 26	50.9%
District 32	52.3%
Mean	**49.0%**

38. In sum, the fragmentation of the black population in the Dallas/Tarrant area cannot be explained by reference to traditional redistricting goals. Plan 1374C seriously undercuts four such goals (geographic compactness, preservation of communities of interest, maintenance of the cores of existing districts, and protection of influential incumbents), advances none, and achieves a mixed record on one (preservation of jurisdiction lines).

39. It may well be that the overarching goal of Plan 1374C in the Dallas/Tarrant area was political: to deny Dallas/Tarrant Democrats any opportunity to elect a representative of their choice outside CD 30. However, it is certain that the legislators who crafted and adopted the plan knew full well that in using minorities as pawns in this partisan game they had dismantled an African-American

opportunity district and had submerged black voters into districts where no such opportunity exists. Legislators were specifically warned of this by Professor Gaddie, consultant to the Attorney General, in response to questions by Senator Gallegos during his Senate testimony of 22 July 2003:

> Senator Gallegos: "As part of your testimony you stated that African-Americans in District 24 control the primary and elect the candidate of their choice in the general election. Is that true?"
>
> Dr. Gaddie: "That is correct."
>
> Senator Gallegos: "Do you agree that that is not the case in District 24 under Senator Staples' plan."
>
> Dr. Gaddie: "District 24 as drawn under the Staples Plan is a much more Republican district."
>
> Senator Gallegos: "So the answer is yes?"
>
> Dr. Gaddie: "Yes."[19]

Leaders of the redistricting effort in the House and Senate likewise questioned the legality of fragmenting the black population in current CD 24. Representative Phil King (R-Weatherford), House leader of the Republican redistricting effort, withdrew from consideration in July a plan aimed at

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[19] *Ibid.*, note 15. District 24 under the Staples Plan examined by Dr. Gaddie was similar in its Republican composition to District 24 under Plan 1374C.

redrawing CD 24 as a Republican district. According to the *Houston Chronicle*:

> [He] removed it from consideration in the special legislative session Wednesday, admitting the proposal likely would violate federal law protecting minority voting rights. . . . King said he had discovered potential Voting Rights Act violations in his maps for the 18th and 25th districts in Houston and the 24th in Dallas. . . . In the 24th District, held by Rep. Martin Frost, D-Dallas, King said, the combined black and Hispanic voting age population would have decreased from 55 percent to 51 percent, a possible Voting Rights Act violation.

Plan 1374C makes a far more drastic reduction of the combined black and Hispanic population in CD 24, reducing it not to 51 percent, but to 26 percent. And the *Fort Worth Star-Telegram* reported:

> Rep. Phil King, R-Weatherford, said he probably goofed when he redrew the district represented by U.S. Rep. Martin Frost, D-Arlington. The map that King had proposed would take predominately minority areas in southeast and north Fort Worth and put them into a Republican district dominated by Denton County. King had hoped to have the map approved by the House Committee on Redistricting on Wednesday, with a vote by the full House as early as Monday. But he withdrew the map from consideration until it is modified.

After withdrawing his map, King introduced a new design that restored CD 24 to its minority strength under Plan 1151C, in King's words, "just to make sure that there was no possibility that we were in any way violating or going against the spirit of the Voting Rights Act." Similarly, to avoid a voting-rights violation, Senator Chris Harris (R-Arlington) also withdrew a plan to dismantle CD 24. According to the *Fort Worth Star-Telegram* on 20 September 2003:

> Even state Sen. Chris Harris, R-Arlington, who earlier in the summer offered up a map to decimate Frost's district, concedes that the Democrat is untouchable. "I'm just following the leadership," Harris said. "I wanted to deal with Martin Frost. But it was decided by the powers that be that he has a minority-impact district and if we did anything to it we might be vulnerable to a court challenge we didn't want. And that's why I got out of the mapmaking business."[20]

40. Later, on the eve of passage of Plan 1374C, which was drafted behind closed doors by the Republican leadership and again targeted CD 24, King once more raised doubts about tampering with this district, citing an opinion from consulting lawyers that the dismantling of minority opportunity District 24 could not legally be offset by augmenting the black population of a congressional district in

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[20] R. G. Ratcliffe and Rachel Graves, "Texas Legislature Special Session: One Redistricting Plan Withdrawn," *Houston Chronicle*, 3 July 2003, A, 1; Jay Root and Jack Douglas, Jr., "Redistricting Map Goes Back to Drawing Board," *Fort Worth Star Telegram*, 3 July 2003, 1; Jay Root and John Douglas, Jr. "Map's New Lines Would Spare Frost," *Fort Worth Star Telegram*, 4 July 2003, 1; John Moritz, "Senate Panel Adopts Remap," *Fort Worth Star Telegram*, 20 September 2003, 1.

Houston, currently held by Representative Bell. According to the *Houston Chronicle* of 5 October 2003:

> "Obviously, when you have one of the attorneys say, 'This is a problem,' and you're 24 hours away from voting something out, that's a concern," King said. "They're concerned the (black population) enhancement in [District] nine, or Chris Bell's district, is not sufficient to offset the loss of Martin Frost's district," King said.[21]

41. Thus, legislators decided on the basis of secret meetings to crack and disperse black voter strength in CD 24 even though they believed they were tampering with a district protected under the Voting Rights Act, regardless of what was done in the Houston area. Clearly intentional discrimination against African-Americans in the Dallas/Tarrant region cannot be offset by changes elsewhere in the state any more than intentional discrimination against black employees in a company's plant in Dallas could be corrected by better treatment of black employees at its plant in Houston.

C. As Compared to Current Plan 1151C, Plan 1374C Does Not Substantially Improve Black Opportunities to Elect Candidates of Their Choice in the Houston Region.

42. In its Section 2 submission, the state claims to have created in Plan 1374C an additional black opportunity district in the Houston region (District 9, under Plan 1374C). However, as compared to Plan 1151C, Plan 1374C does not

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[21] R. G. Ratcliffe, "New Map Targets Anglo Democrats, GOP's Lawyers Raise Concerns," *Houston Chronicle*, 5 October 2003, A, 33.

create *de novo* an additional district that provides black voters reasonable opportunities to elect candidates of their choice. Rather Plan 1374C, in effect, bolsters the black population in District 25 under Plan 1151C, which the three-judge Court in the *Balderas* decision recognized as a district that already "for all practical purposes was under the control of blacks." District 25 under current Plan 1151C is a majority-minority district with a black population of 23.7 percent, a Hispanic population of 34.3 percent, and a 6.0 percent population of other minorities. Its combined black and Hispanic population is 57.4 percent, and its combined minority population is 63.4 percent. Its voting-age population is 22.0 percent black and 30.7 percent Hispanic, with a 6.4 percent population of other minorities. Its combined black and Hispanic voting-age population is 52.3 percent, and its combined minority voting-age population is 58.8 percent. In validation of the Court's assessment of current CD 25, Table 14 demonstrates that from 1996 to 2002, black voters comprised a majority of the Democratic primary turnout in CD 25, with a mean of 55 percent. During the two most recent elections, blacks comprised a mean of 54 percent of Democratic primary voters within current CD 25. In runoff elections from 1996 to 2002, blacks comprised 48 percent of the Democratic turnout in CD 25 and 49 percent in the most recent elections. In the 2002 Democratic runoff, the only Democratic runoff during recent years to include African-American statewide or congressional candidates within the boundaries of CD 25, blacks comprised 58 percent of the turnout.

Table 14

Ecological Regression Estimates
Primary and Runoff Turnout
Percent Black Among Voters
Current Congressional District 25
Democratic Primary and Runoff Elections
1996-2002

	1996	1998	2000	2002	Mean 1996-2002	Mean 2000-2002
Primary	42%	69%	58%	50%	55%	54%
Runoff	46%	NA	39%	58%	48%	49%

43. Analysis of the 2002 Senate primary, runoff, and general election and the 2002 congressional primary and runoff that included Anglo and black candidates discloses an electorate less polarized along racial lines than in the Dallas/Tarrant area. Table 15 reports results for the 2002 Senate elections and the 2002 Democratic primary that included black candidate Whittier. In the Democratic primary contests, black voters did not unite behind the black candidate Kirk, who won only 42 percent of the black vote. In fact, both Anglo and black voters in the primary voted for the Anglo candidates. According to results reported in Table 15, 53 percent of black voters voted for the Anglo candidates as did 86 percent of Anglo voters. Nearly all the votes for Anglo candidates went to Representative Bentsen, who had represented CD 25 in Congress. The other two Anglo candidates were marginal contenders with minimal support from any racial group. With low Anglo support and less than

majority black support, Kirk overall won 22 percent of the vote cast within current CD 25 in the primary election. Likewise, black candidate Whittier lost in the primary election with majority opposition from Anglos and blacks here, as elsewhere in the state. In the runoff

Table 15

Ecological Regression Analysis
Racial Bloc Voting in Congressional District 25 in 2002
Primary, Runoff, and General Elections

Primary Elections			
	Percent for Black Candidate	**Percent for Anglo Candidate(s)**	**Percent for Hispanic Candidate**
US Senate Black Candidate Kirk Hispanic Candidate Morales			
Anglo Voters	7%	86%	7%
Black Voters	42%	53%	6%
Hispanic Voters	NA	NA	NA
All Voters	22%	67%	11%

Court of Criminal Appeal, Place 2 Black Candidate Whittier			
Angelo Voters	35%	65%	
Black Voters	38%	62%	
Hispanic Voters	NA	NA	
All Voters	37%	63%	
Runoff Elections			
	Percent for Black Candidate		**Percent for Hispanic Candidate**
US Senate Black Candidate Kirk Hispanic Candidate Morales			
Anglo Voters	61%		39%
Black Voters	94%		6%

Hispanic Voters	NA		NA
All Voters	79%		21%

General Elections			
	Percent for Democratic Candidate	**Percent for Republican Candidate**	
US Senate Black Candidate Kirk			
Anglo Voters	33%	67%	
Black Voters	99%	1%	
Hispanic Voters	NA	NA	
All Voters	54%	46%	

election, Kirk prevailed overwhelmingly against Hispanic candidate Morales with substantial majority support from both black and Anglo voters. In this Democratic district, Kirk prevailed in the general election with nearly unanimous black support and a third of the Anglo vote. Kirk's failure to win in one of three elections within current CD 25 – the primary election – reflected not just Anglo bloc voting against him, but a lack of African-American support. And his victory in the runoff reflected both African-American and Anglo support. In none of these Democratic elections then was there significant polarization along racial lines between blacks and Anglos. There was significant polarization in the general election, but Kirk prevailed in current CD 25 with solid black support. Indeed, as indicated in Table 16,

outcomes for the statewide primary, runoff, and general elections involving black candidates

Table 16

Candidates Prevailing Within Boundaries of Congressional District 25, Plan 1151C and Congressional District 9, Plan 1374C 2002 Primary, Runoff, and General Elections

	Winner Within District	
	Congressional District 25, Plan 1151C	**Congressional District 9, Plan 1374C**
2002 Senate Primary	Bentsen	Bentsen
2002 Ct Criminal Appeals Place 2	Montgomery	Montgomery
2002 Senate Runoff	Kirk	Kirk
2002 Senate General	Kirk	Kirk

in 2002 were precisely the same in proposed District 9 under Plan 1374C as in current District 25 under Plan 1151C, with Kirk and Whittier losing the primary and Kirk winning the runoff and general elections.

44. Table 17 reports results for the 2002 Anglo-versus-black primary and runoff for Congress in CD 25. Given that the vote was closely divided among the four candidates in the primary election, Table 17 reports results individually for each candidate. For the primary election, results reported in Table 17 show that the black candidate Robinson carried a bare majority of the black vote, with 51 percent, enough to place him in the runoff election with only 26 percent of the total votes cast. Bell also obtained substantial black support, winning 37 percent of the black vote cast in the election. Considering only the black vote cast for either Robinson or Bell, Robinson received 58 percent of this vote and Bell 42 percent. The bulk of the Anglo vote was about equally divided between Anglo candidates Bell and Colbert, with each winning 37 percent. Thus, it was Bell's strong support among black voters that propelled him into the runoff election against Robinson, as the candidates preferred by 88 percent of black voters made the runoff. In an extremely low-turnout runoff election with less than four percent turnout of the voting-age population, Bell won the bulk of the Anglo vote (88%), but also received substantial crossover support from blacks, winning 31 percent of the black vote. That gave him an eight-point victory in an election in which the majority of voters were black.

Table 17

Ecological Regression Estimates
Racial Bloc Voting in Congressional District 25 in 2002
Congressional Democratic Primary and Runoff Elections

Democratic Primary				
	Percent for Black Candidate Robinson	**Percent for Anglo Candidate Bell**	**Percent for Anglo Candidate Colbert**	**Percent for Anglo Candidate King**
Anglo Voters	4%	37%	37%	22%
Black Voters	51%	37%	5%	7%
Hispanic Voters	NA	NA	NA	NA
All Voters	26%	36%	21%	17%

Democratic Runoff		
	Percent for Robinson	**Percent for Bell**
Anglo Voters	12%	88%
Black Voters	69%	31%
Hispanic Voters	NA	NA
All Voters	46%	54%

General Election		
	Percent for Democratic Candidate	Percent for Republican Candidate
Anglo Voters	41%	59%
Black Voters	96%	4%
Hispanic Voters	NA	NA
All Voters	56%	44%

45. The primary and runoff contests involving Bell and Robinson cannot, of course, be replicated within proposed District 9 under Plan 1374C, because numerous precincts of new District 9 were not in CD 25 when the election was held. And it certainly is not predictable that an African-American challenger would prevail in a future primary contest against Bell in proposed CD 9 given that he won 31 percent of the black vote in an open-seat runoff and 42 percent of the black vote in an open-seat primary when stacked up only against black candidate Robinson. In 2004 Bell would be running as an incumbent Member of Congress. It is important to note that Bentsen, not running as a congressional incumbent seeking reelection but as a retiring congressional incumbent seeking to move up to the Senate, beat a strong black candidate Kirk in the battle for the black vote in CD 25 under Plan 1151C. Within new CD 9 under Plan 1374C, as indicated in Table 18, Bentsen also beat Kirk in the competition for the black vote in the 2002 Democratic primary, winning 52

Table 18

Division of the Black Vote in Congressional District 9 Under Plan 1374C in the 2002 Democratic Primary for Senate

	Kirk (B)	Bentsen (A)	Other Anglo	Morales (H)
Percent of the Black Vote for Candidate	42%	52%	1%	5%

percent, compared to 42 percent for Kirk.[22] Even Republican sponsors of redistricting doubted whether enhancement of the black voting-age population in current CD 25 to the 36 percent level in proposed CD 9 would be sufficient to affect the outcome of future congressional elections. According to the *Houston Chronicle*, Representative King had first "told the committee Tuesday that the reconfigured 25th District in Harris County likely would elect a black representative, but 'it appears now its numbers will not reach that level.' King's proposal would have increased the district's black voting-age population from 22 percent to 36 percent and would have kept the Hispanic population at 31 percent."[23] These

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[22] The drafters of Plan 1374C attempted to draw Bell outside CD 9, but according to a 17 October 2003 report in *The Houston Chronicle* (R. G., Ratcliffe, "Map lines aren't all that move under GOP plan," Section A, p. 1), Bell has indicated that he will run for reelection within CD 9 if necessary.

[23] *Ibid.*, note 19.

minority percentages, which led to the withdrawn plan, are virtually identical to the minority percentages in Plan 1374C, which pegged the black voting-age population of CD 9 at 36.5 percent and the Hispanic voting-age population at 30.3 percent.

46. In addition, the argument that a violation of Section 2 of the Voting Rights Act in Dallas/Tarrant can be rectified by augmenting the black percentage of a Houston-based district defies logic. The *Balderas* Court certified that Plan 1151C conforms to Section 2 of the Voting Rights Act, in the Houston region and elsewhere in the state. This judgment was affirmed by the United States Supreme Court. Thus, a Voting Rights Act violation created by Plan 1374C in Dallas/Tarrant certainly cannot be offset by an alleged repair of a voting-rights defect in Houston which does not exist. Moreover, even if for analytic purposes it is assumed that Plan 1151C violates the Voting Rights Act by depriving African-Americans of opportunities to elect candidates of their choice in a second Houston-based district, the State cannot be brought into compliance by a new plan that repairs the voting-rights defect in Houston but creates a new violation in Dallas/Tarrant. Moreover, given the proportionality data presented in Table 5 above, the State cannot fall back upon the argument that three African-American opportunity districts (two in Houston and one in Dallas) match or exceed proportionality for African-Americans across the state.

IV. Hispanic Voter Opportunities

A. Plan 1374C Dilutes Hispanic Voter Opportunities in the Area of the State Covered by Current and Proposed Congressional District 23

47. Plan 1374C dilutes Hispanic voter opportunities in the region of the state covered by CD 23 in southwest Texas under the current and proposed plans. This region is marked by racially polarized voting, in both primary and general elections, with Hispanic voter cohesion and Anglo bloc voting. With respect to minority cohesion, for Hispanic-versus-Anglo Democratic primary elections from 1994 through 2000, Table 1 reveals that for both Bexar and El Paso Counties, a mean of more than 70 percent of Hispanic voters united behind Hispanic candidates. There are also 5 Anglo-versus-Hispanic congressional primary or runoff elections within CD 23 (in its pre-2001 configuration) from 1994 to 2000 reported in Table 3. In 4 of these 5 elections, a majority of Hispanic voters supported the Hispanic candidate. For all 5 elections, a mean of 59 percent of Hispanic voters supported Hispanic candidates. Table 19 updates the analysis of Hispanic-versus-Anglo elections to include for current CD 23 the 2002 statewide primaries involving Anglo and Hispanic candidates. These include the primaries for U.S. Senate with one Hispanic, one black, and two Anglo candidates, and for Land Commissioner and Agriculture Commissioner, each with one Hispanic and one Anglo candidate. The table includes only Anglo and Hispanic voters, because blacks are not a significant presence in this part of the state. In all three primaries, results reported in Table 19 show that a majority of Hispanic voters supported the Hispanic candidate, with a mean of 78 percent support.

Table 19

Ecological Regression Estimates
Racial Bloc Voting in Congressional District 23 in 2002
Anglo v. Hispanic Primaries and General Elections

Primary Elections						
	Anglo Voters			Hispanic Voters		
Election	% for Anglo Candidate	% for Black Candidate	% for Hispanic Candidate	% for Anglo Candidate	% for Black Candidate	% for Hispanic Candidate
US Senate	55%	45%	0%	18%	19%	63%
Agriculture Commissioner	100%	NA	0%	0%	NA	100%
Land Commissioner	100%	NA	0%	28%	NA	72%
Mean	**85%**	**NA**	**0%**	**15%**	**NA**	**78%**

General Elections				
	Anglo Voters		Hispanic Voters	
Election	% for Democratic Candidate	% for Republican Candidate	% for Democratic Candidate	% for Republican Candidate
Governor	16%	84%	99%	1%
Supreme Court, Position 2	21%	79%	99%	1%
Court of Criminal Appeals, Place 1	15%	85%	99%	1%
Mean	**17%**	**83%**	**99%**	**1%**

48. General elections likewise reveal a clear pattern of Hispanic voter cohesion, in this case for Democratic nominees. Table 4 indicates that in both Bexar and El Paso Counties more than 85 percent of Hispanic voters united behind Hispanic candidates. Table 19 updates the general election analysis with the 2002 general election for Governor in which Democratic Hispanic candidate Sanchez competed against Republican Anglo candidate Perry. It also includes general elections for Supreme Court Position 2 and Court of Criminal Appeals Place 1, in which Hispanic Democrats competed against Anglo Republicans. In these elections, Hispanics provided near unanimous support for Hispanic Democratic candidates. Table 20 reports results within CD 23 for general elections from 1996 to 2002, all of which involved Hispanic Republican incumbent Henry Bonilla. The elections from 1996 to 2000 encompass the pre-2001 configuration of CD 23. The results reported in Table 20 clearly demonstrate that Hispanic voters in general elections lined up for the Democratic challenger in every election and voted against Republican Bonilla in every election. For the four elections, a mean of 79 percent of Hispanic voters supported the Democratic candidate, compared to a mean of 21 percent who supported Bonilla.

Table 20

Ecological Regression Estimates
Hispanic and Non-Hispanic Voting in General Elections
in Current and Prior Congressional District 23
1996-2002

Year of Congressional Elections, District 23	% Hispanic Voters Voting for Bonilla	% Hispanic Voters Voting for Democratic Candidates	% Non-Hispanic Voters Voting for Bonilla	% Non-Hispanic Voters Voting for Democratic Candidates
1996	30%	70%	83%	17%
1998	26%	74%	85%	15%
2000	20%	80%	83%	17%
2002	8%	92%	88%	12%
Mean	**21%**	**79%**	**85%**	**15%**

49. The analysis of primary and general elections in the region covered by CD 23 also shows Anglo bloc voting against Hispanic candidates of choice. Table 1 reveals that for Bexar and El Paso Counties Anglo support for Hispanic candidates in Democratic primaries from 1996 to 2000 averaged 25 percent and 31 percent, respectively. In all 5 Anglo-versus-Hispanic congressional primary elections within CD 23 under the pre-2001 plan reported in Table 3, a majority of Anglo voters voted against the Hispanic candidates. For all five elections, a mean of 18 percent of Anglo voters supported Hispanic candidates. In the 2002 statewide primaries involving Hispanic and Anglo candidates, Table 19 reveals close to unanimous Anglo

opposition to statewide Hispanic candidates in CD 23. In the updated general election results for 2002 reported in Table 19, a mean of 17 percent of Anglo voters supported Hispanic Democratic candidates. In general elections for Congress within CD 23, as reported in Table 20, Anglo voters supported Republican Bonilla in every election, providing a mean of only 15 percent for his Democratic opponents who were strongly supported by Hispanic voters.

50. The State of Texas in its Section 5 submission purports to have created in their proposed Plan 1374C a Hispanic opportunity district within this region of Texas, also labeled CD 23 under Plan 1374C. However, this claim will not withstand scrutiny.[24] As indicated in Table 21, CD 23 under Plan 1374C is a solidly Republican district that would provide little opportunity for Hispanic voters to elect candidates of their choice in general elections. As indicated in Table 21, for the 2002 elections, despite the presence of three Hispanic Democratic candidates in the general elections, the mean Democratic statewide vote in CD 23 under Plan 1374C was only 43.2 percent. All statewide Hispanic Democrats in this district, moreover, fell well short of victory in this substantially Republican district. In addition, CD

[24] If, as the state argues, CD 23 is an effective opportunity district for Hispanic voters, then it follows that CD 25 under the current plan must be an effective opportunity district for black voters. CD 25 under current Plan 1151C, as demonstrated above, provides black voters a far greater opportunity to elect candidates of their choice than does CD 23 under Plan 1374C for Hispanic voters, as demonstrated below.

Table 21

Democratic Performance in Congressional District 23
Plan 1374C

Democratic Percentage Of Two-Party Vote			
2002 Mean Statewide	**2002 Governor Hispanic Candidate Sanchez**	**2002 Supreme Court, Place 2 Hispanic Candidate Yanez**	**2002 Court of Criminal Appeals, Place 1 Hispanic Candidate Molina**
43.2%	44.0%	45.8%	42.3%

23 under Plan 1374C is only 50.9 percent Hispanic in voting-age population and 44.0 percent Spanish surname in its registration. Not only does the evidence show that Hispanics vote overwhelmingly against even Hispanic Republicans in general elections, but as indicated in Table 22, Hispanics who participate in primaries almost universally choose to participate in Democratic rather than Republican primaries. Thus District 23 under Plan 1374C would deny all but a very small proportion of Hispanic voters in this region of the state the opportunity to elect candidates of their choice to Congress. It is virtually certain that the district would elect Republican incumbent Bonilla, who, on average in recent elections, has been the candidate of choice of only about a fifth of the Hispanic electorate. In addition, as illustrated in Chart 1, Bonilla's percentage of the Hispanic vote in general

elections has been steadily declining since 1996, falling to 8 percent in 2002.

Table 22

Percentage of Hispanic Voters in Current Congressional District 23 Participating in Democratic and Republican Primaries, 1996 to 2002

Congressional District 23	Percent of Hispanic Voters in Democratic Primary	Percent of Hispanic Voters in Republican Primary
2002 Primary	99%	1%
2000 Primary	100%	0%
1998 Primary	100%	0%
1996 Primary	100%	0%

51. Congressional District 23 under alternative Plan 1151C demonstrates that it is possible to create in this area of Texas a district which provides Hispanics real opportunities to elect candidates of their choice to Congress. Table 23 compares CD 23 under Plan 1374C (which the state purports to be a Hispanic opportunity district, but as demonstrated above is not) with CD 23 under Plan 1151C. Unlike CD 23 under Plan 1374C, CD 23 under Plan 1151C has a Hispanic voting-age majority of 63 percent (compared to a bare Hispanic VAP majority of 50.9 percent under Plan 1374C) and a clear Spanish surname registration majority of 55

percent. The mean Democratic performance for CD 23 under Plan 1151C is 9.3 percentage points higher than for CD 23 under Plan 1374C. All 2002 Hispanic statewide general election candidates prevailed in CD 23 under Plan 1151C, with votes that were about 10 percentage points higher than in CD 23 under Plan 1374C, where all the Hispanic candidates lose.

Chart 1 - Hispanic % For Bonilla

General Elections, Congressional District 23, 1996-2002

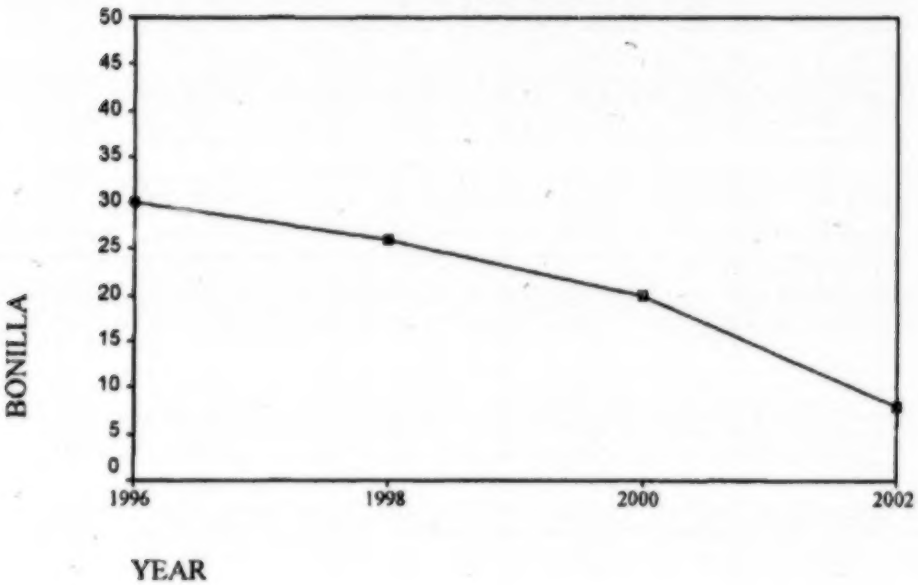


Table 23

Comparison of Congressional District 23 in Plan 1374C With Congressional District 23 in Alternative Plan 1151C

	Congressional District 23, Plan 1151C	Congressional District 23, Plan 1374C	Difference
% Hispanic VAP	63.0%	50.9%	-12.1%
% Spanish Surname Registration	55.3%	44.0%	-11.3%
Mean Two-Party Democratic Vote, Statewide Elections, 2002	52.5%	43.2%	-9.3%
Two-Party Vote for Democratic Hispanic Candidate Sanchez for Governor 2002	54.3%	44.0%	-10.3%

Two-Party Vote for Democratic Hispanic Candidate Yanez for Supreme Court, Place 2, 2002	55.5%	45.8%	-9.7%
Two-Party Vote for Democratic Hispanic Candidate Molina for Court of Criminal Appeals, Pl 1, 2002	52.6%	42.3%	-10.3%

52. The 2002 elections are most probative in CD 23 both because they include the most viable Hispanic candidates in recent years and because Hispanic voter strength is rapidly increasing in recent years as demonstrated by Charts 2 and 3, which show rising rates of Spanish surname registration. As indicated by Chart 3, if trends in the district continue, its percentage of Spanish surname registrants should be nearly two percentage points higher in 2004, as compared to 2002, and nearly four percentage points higher in 2006, as compared to 2002.

53. It is true that Hispanic incumbent Bonilla won CD 23 under Plan 1151C in the 2002 general election despite strong Hispanic voter opposition. However, Bonilla carried the district with a bare 52 percent majority, despite all the advantages of incumbency. Moreover, given the rising Hispanic voter strength in this district, Hispanics have a realistic opportunity to elect a congressional candidate of their choice in upcoming elections. They have no such realistic opportunity in CD 23 under Plan 1374C.

B. The Fragmentation of Hispanics in the Area of the State Covered by Current and Proposed Congressional District 23 Is Intended to Deny Hispanic Voters the Opportunity to Participate Fully in the Political Process and to Elect Candidates of Their Choice to Congress

54. The design of Plan 1374C in the area of Congressional District 23 is intended to "crack" the Hispanic community, breaking off a significant component of Hispanic voter strength so that the remaining Hispanics in new CD 23 lack the opportunity to elect a congressional candidate of their choice. The drafters of Plan 1374C split Webb County in half to shift 52 percent of its population from CD 23 under Plan 1151C into CD 28 under Plan 1374C. This piece of Webb County cracked the Hispanic core of CD 23, removing 99,776 constituents who are more than 90 percent Hispanic in voting-age population, 91 percent Spanish surnamed in voter registration, and 86.5 percent Democratic as gauged by the 2002 statewide elections. In the 2002 general election, Bonilla won only 14 percent of the vote cast in this fragmented section of Webb County. This solidly Hispanic and Democratic constituency is replaced mainly by 101,260 constituents from CD 21 under Plan 1151C. This population is 76 percent Anglo and one of the staunchest Republican voting blocs in the state of Texas, voting 79 percent

Republican as measured by the 2002 statewide elections. The Hispanic population added to CD 28 does not enhance relative to Plan 1151C the opportunities for Hispanic to elect candidates of choice in that Congressional District. District 28 was already an effective Hispanic opportunity district under Plan 1151C, with a Hispanic voting-age population of 65.7 percent, a Spanish surname registration of 58.4 percent, and a 59 percent Democratic index as gauged by statewide elections in 2002.

Chart 2 - Trend in Spanish Surname Registration

Current Congressional District 23, 1996-2002

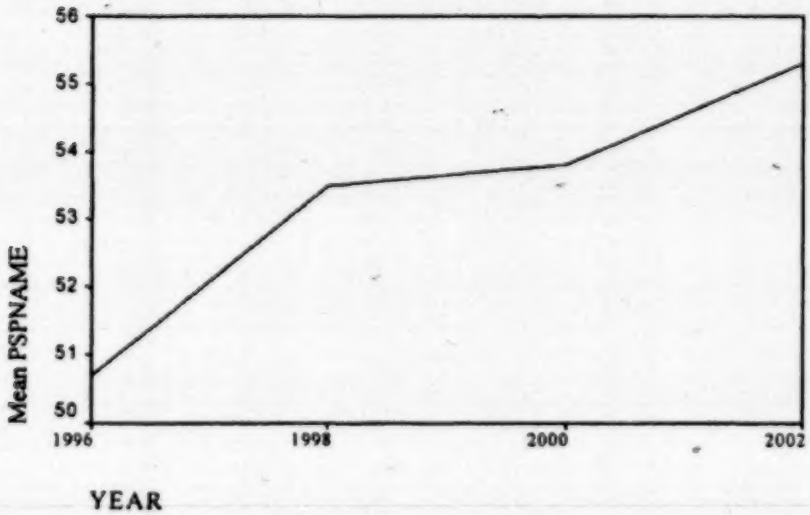
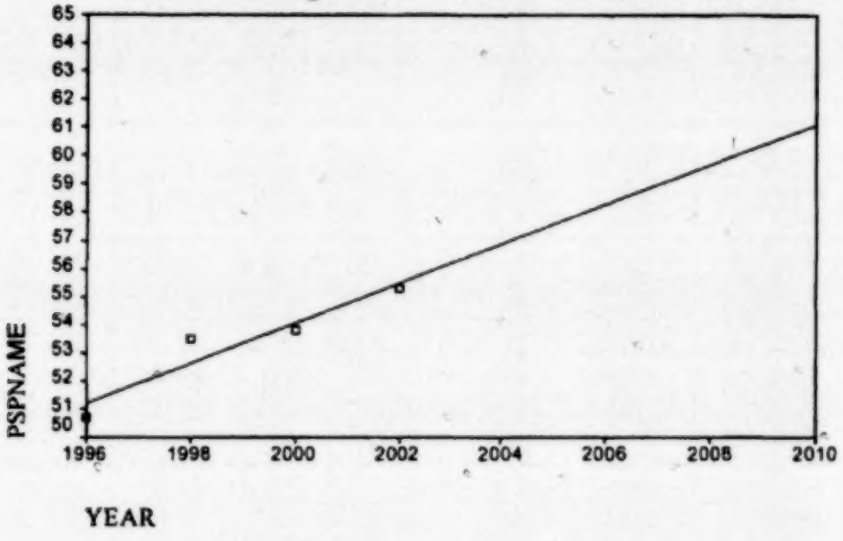


Chart 3 - Trend in Spanish Surname Registration

Current Congressional District 23, 1996-2010



55. The cracking of the Hispanic population in the region of CD 23 cannot be justified by reference to traditional nonracial redistricting goals such as geographic compactness, protection of communities of interest, preservation of jurisdictional lines, maintenance of the cores of existing districts, and protection of senior incumbents, all but one of which are undermined, not advanced, by Plan 1374C. The changes made in Congressional Districts 21, 23, and 28 do not produce major upheavals in geographic compactness, but on balance do result in districts that are less compact in Plan 1374C than in Plan 1151C. As indicated in Table 24, as compared to current Plan 1151C, Plan 1374C makes two of the three affected districts less compact. The compactness indexes reported in Table 24 show that Districts 21 and 28 are less compact on both measures in Plan 1374C as compared to Plan 1151C, whereas District 23 is more compact on the two measures. Overall, with respect to the three districts combined, Plan 1374C is about 25 percent less

compact on both measures. Thus, geographic compactness cannot be a justification for the cracking of the Hispanic population in CD 23.

Table 24

Congressional Districts 21, 23, and 28 under Plan 1151C and Plan 1374C
Comparison of Compactness Measures

	Plan 1151C Perimeter to Area	Plan 1374C Perimeter to Area	Plan 1151C Smallest Circle	Plan 1374C Smallest Circle
Congressional District 21	3.2	7.1	1.8	2.8
Congressional District 23	6.1	5.1	4.2	3.8
Congressional District 28	5.4	5.7	3.7	5.0
Mean	**4.9**	**6.0**	**3.2**	**3.9**

Source: *Texas Legislative Council, Report Package*. As indicated by the Council: Each measure is reported on a scale of 1 or greater, **with lower numbers being more compact.**

56. Plan 1374C also negates three other traditional, nonracial redistricting goals. First, it counteracts the preservation of communities of interest by splitting off Webb County residents who were well-integrated with the remainder of CD 23 and replacing them with predominantly Anglo populations from newly included counties who have little in common linguistically, historically, and socio-economically with the remaining core of CD 23. Second, the

splitting of Webb County and corresponding changes also make it more difficult to maintain the cores of existing districts. As indicated in Table 25, the mean core retention for these three districts is 64.6 percent, indicating that nearly 700,000 constituents in this area covered by these districts have been allocated to new congressional districts. Third, the cracking of the Hispanic community in CD 23 in Plan 1374C results in the splitting of more jurisdictional lines in Districts 21, 23, and 28 than Plan 1151C. Plan 1374C splits more counties and more municipalities than Plan 1151C for these three districts.

Table 25

Core Retention of Congressional Districts 21, 23, and 28 Change from Plan 1151C to Plan 1374C

District under Plan 1151C	Percent of Core Retained in Plan 1374C
District 21	65.8%
District 23	81.5%
District 28	46.5%
Mean	**64.6%**

57. The only redistricting goal advanced by the drafters of Plan 1374C in the three-district region analyzed is to protect the incumbency of Republican Representative Henry Bonilla in CD 23. As indicated above, the replacement of the heavily Hispanic, heavily Democratic population of Webb County with the heavily Anglo, heavily Republican

population from CD 21 transforms CD 23 under Plan 1374C into a solidly Republican district.

58. Again, it is surely true that the changes in CD 23 made by the drafters of Plan 1374C were part of an overall plan to deny Democrats opportunities to elect candidates of their choice. However, once again, minority voters were knowingly used as pawns in this process, thereby deliberately denying Hispanics opportunities to elect candidates of their choice. As already indicated, Bonilla was barely hanging on with 52 percent of the vote and minimal support from Hispanics in a district rapidly becoming more Hispanic in voter registration. Legislators were warned in public hearings by Dr. Gaddie, the Attorney General's expert, that Congressional District 23 "performed" for Hispanic voters in the most recent Hispanic-versus-Anglo general elections – the most relevant elections in this changing district. And they were warned by Dr. Gaddie that Representative Bonilla was not the Hispanic candidate of choice. Republicans crafting the congressional redistricting plans explicitly recognized that the only purpose for cracking the Hispanic community in Webb County was to guarantee Bonilla's reelection and prevent Hispanic voters from electing a candidate of their choice in CD 23. According to the *San Antonio Express News*:

> San Antonio Democrats were dealt a particularly heavy blow when a majority approved an amendment by Sen. Jeff Wentworth, R-San Antonio. His plan, approved by a four-vote margin, would delete a significant portion of Bexar County from the district [current CD 28] of U.S. Rep. Ciro Rodriguez, D-San Antonio, and replace it with a chunk of Webb County. . . . "In my judgment, it

> adds a few more people who traditionally vote Republican to Congressman (Henry) Bonilla's district, which helps him in his re-election in 2004," Wentworth said. "That was the principal motivation I had in offering the amendment."[25]

59. In addition, the pretextual nature of the state's justification for changes in the region of CD 23 is apparent from the contradictions between the written statement submitted to the Department of Justice and the accompanying statistical analyses. In his statement on behalf of the state, Andy Taylor asserted that "Congressman Bonilla receives up to 40 percent of the Hispanic vote in CD 23." But in support of this assertion, Mr. Taylor cites none of the State's statistical tables. Instead, he quotes the following exchange from Dr. Gaddie's testimony during the *Balderas* trial:

> Q. Assume with me that there is some prior testimony that he [Bonilla] gets about 40 percent of Hispanic votes on average. Does that sound about right to you?
>
> A. I've heard a figure like that, yes.
>
> Q. Does that suggest to you that cohesion among Hispanic voters in District 23 as it pertains to Congressional elections is low?

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[25] Guillermo X. Garcia and Peggy Fikac, "Senate Gives Initial OK to New Map," *San Antonio Express-News*, 24 September 2003, 1A.

A. Relatively low, yes.

Q. Relatively low. Is it one part of the candidate of choice analysis or one idea behind the candidate of choice analysis that you tend to see fairly overwhelming bloc voting among whatever particular group you are looking at.

A. Yes.[26]

60. That Bonilla wins "40 percent of Hispanic votes on average" in general elections is a myth. Although the state clearly had the capacity to analyze the general elections in CD 23 to estimate the Hispanic vote for Bonilla in recent elections, they fail to do so – despite presenting hundreds of other analysis. The state analyzes only one general election for Congress in CD 23 – the 1996 contest in which Bonilla received 62 percent of the overall vote, but according to the state's own findings only 29 percent of the Hispanic vote. Moreover, from 1996 to 2002 Bonilla's overall vote fell to 52 percent and his support from Hispanics declined. As indicated in Table 20 above, from 1996 to 2002 Bonilla received a mean of only 21 percent of the Hispanic vote – about half of the State's claim of 40 percent.

61. Mr. Taylor's memo also quotes Dr. Gaddie to support a claim that "Hispanics in Texas are increasingly voting Republican," with the implication that Hispanic support for Bonilla may even rise above the 40 percent level.[27] As shown above, this claim is incorrect as regards Mr. Bonilla in CD

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[26] Ibid., note 14, pp. 10-11.

[27] Ibid., p. 11.

23. His support from Hispanic voters has been steadily declining; in 2002 his percentage of the Hispanic vote was barely more than a fourth of the percentage he received in 1996. The state's claim about rising Hispanic support for Republicans is also refuted by the state's own analysis of statewide general elections in District 23 that include Anglo Republicans and Hispanic Democrats.[28] As indicated in Table 26, for this set of comparable general elections, the mean Hispanic vote for the Republican candidate declined sharply from 9.7 percent in 1996-1998 to 0.1 percent in 2002. There were no Hispanic-versus-Anglo statewide general elections in 2000.[29]

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[28] The state analyzed only statewide general elections with Hispanic and black candidates, although it inexplicably failed to included the election for Court of Criminal Appeals Place 1 in 2002 that included Hispanic candidate Molina. My own analysis of that election in CD 23 shows only 1 percent support for the Republican candidate.

[29] My own analyses confirm declining Hispanic support for Republican candidates.

Table 26

Ecological Regression Analyses Presented by State of Texas
Hispanic Votes for Democratic Candidate in Statewide General Elections in Congressional District 23
Comparison of 1996-1998 and 2002

Mean Percentage Hispanic Vote for Republican Candidates: Elections With Anglo Republicans and Hispanic Democrats	
General Elections, 1996-1998	General Elections, 2002
9.7%	0.1%

Source: Texas Section 5 Submission, Racially Polarized Voting Analysis, District 23, Plan 1151C. The analysis included the 1996 elections for U.S. Senator and Railroad Commissioner, the 1998 election for Land Commissioner, and the 2002 elections for Governor and Supreme Court Place 2.

C. The Loss of Hispanic Voter Opportunities in the Area Around Current District 23 Is Not Offset by Changes Elsewhere in Plan 1374C

62. The State of Texas in its Section 5 submission also claims to have created additional opportunities for Hispanic voters that could offset the lack of an effective minority

district in the area of CD 23. They point to the creation of proposed CD 25 as a new majority-Hispanic district which has sufficient Hispanic voter strength to provide Hispanics a realistic opportunity to elect candidates of their choice. And they point to alleged enhancements in CD 29 in the Houston area, as compared to comparable CD 29 under current Plan 1151C. However, Plan 1374C does not enhance Hispanic voter opportunities in CD 29. As compared to CD 29 under Plan 1151C, Plan 1374C does slightly raise the Hispanic VAP and Spanish surname registration, by about 3.5 percentage points. However, in terms of the performance measures in elections, as indicated in Table 27, CD 29 under Plan 1151C actually performs better for Hispanic voters than CD 29 under Plan 1374C. As indicated in Table 27 in five of six Hispanic-versus-Anglo Democratic primary or runoff elections, and in six of six general elections pitting a Hispanic Democrat against an Anglo Republican since 1996, the Hispanic candidate received a higher percentage of the vote in CD 29 under Plan 1151C, as compared to CD 29 under Plan 1374C. Moreover, although the Plan is crafted to remove incumbent Anglo Representative Gene Green from his prior electoral base in CD 29, it is likely that he would simply move back in and run again in a District that includes 81 percent of his previous base.

Table 27

Comparison of Congressional District 29 in Plan 1151C and Congressional District 29 in Plan 1374C Primary, Runoff, and General Elections with Anglo and Hispanic Candidates (Hispanic Democrats in General Elections)

Primary and Runoff Elections			
	Congressional District 29 Plan 1151C % for Hispanic Candidate	**Congressional District 29 Plan 1374C % for Hispanic Candidate**	**Plan With Higher % for Hispanic Candidates**
1996 Elections			
Senate (Primary)	53.8%	52.8%	1151C
Senate (Runoff)	60.4%	59.5%	1151C
1998 Elections			
Agriculture Commissioner	57.2%	54.1%	1151C
2002 Elections			
Senate	38.0%	38.5%	1374C
Land Commissioner	54.1%	53.5%	1151C
Agriculture Commissioner	65.7%	64.4%	1151C

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Primary and Runoff Elections			
	Congressional District 29 Plan 1151C % for Hispanic Candidate	**Congressional District 29 Plan 1374C % for Hispanic Candidate**	**Plan With Higher % for Hispanic Candidates**
General Elections			
1996 Elections			
Senate	62.5%	60.9%	1151C
Railroad Commissioner	58.6%	56.9%	1151C
1998 Elections			
Land Commissioner	59.3%	56.3%	1151C
2002 Elections			
Governor	67.5%	64.4%	1151C
Supreme Court, Position 2	69.3%	66.1%	1151C
Court of Criminal Appeals, Place 1	68.9%	65.8%	1151C

63. The drawing of CD 25 in Plan 1374C also results in the diminution of Hispanic voter opportunities in general elections in the area covered by existing CD 15. This area of the state is marked by racially polarized voting, especially in general elections, with Hispanic voter cohesion and Anglo bloc voting. In primary elections, Table 1 indicates that for the period from 1994 to 2000, in Hidalgo County, a portion

of which comprises most of current CD 15, a mean of more than 70 percent of Hispanic voters supported Hispanic candidates. Likewise in two Hispanic-versus-Anglo congressional primaries within CD 15, a mean of 67 percent of Hispanic voters supported the Hispanic candidates. For 2002 primary elections with Anglo and Hispanic candidates, the updated analysis in Table 28 indicates that a mean of 75 percent of Hispanic voters united behind Hispanic candidates. In general elections, Table 4 for Hidalgo County indicates that for the period from 1994 to 2000 a mean of 86 percent of Hispanic voters supported Democratic candidates. Likewise, as indicated in Table 28, when the analysis is updated to include the 2002 general elections with Hispanic Democratic candidates, a mean of 95 percent of Hispanic voters supported the Democratic candidates.

64. With respect to Anglo bloc voting in primary elections, the Hidalgo County results show that a slight majority of Anglos supported Hispanic candidates for the period from 1994 to 2000. However, this is not the case in Hispanic-versus-Anglo congressional primaries within CD 15. According to Table 3, a mean of 34 percent of Anglo voters supported Hispanic candidates in CD 15. Such Anglo bloc voting in primary elections also emerges in the 2002 updates, as Table 28 indicates that a mean of 29 percent of Anglo voters supported Hispanic candidates. In general elections, Table 4 indicates that in Hidalgo County 32 percent of Anglo voters supported Democratic candidates, a finding of Anglo bloc voting that is corroborated by recent general-election results reported in Table 28. In the 2002 general elections, a mean of 23 percent of Anglo voters supported Hispanic Democrats.

65. As compared to CD 15 in current Plan 1151C, CD 15 in Plan 1374C substantially reduces the Hispanic percentage of the voter turnout in general elections. According to results reported in Table 29, in CD 15 under Plan 1374C, the Hispanic percentage of general-election voters from 1996 to 2002 averages only 38 percent. This compares to an average of 52 percent in CD 15 under Plan 1151C, 14 percentage points higher. This creates a more precarious situation for Hispanic candidates of choice in general elections in CD 15 under 1374C, as compared to Plan 1151C.

Table 29

Hispanic Percentage of General-Election Voters
Congressional District 15
Plan 1151C and Plan 1374C

	Percent Hispanic in General Election Turnout	
Year	**Plan 1151C 74 Percent Hispanic VAP**	**Plan 1374C 64 Percent Hispanic VAP**
2002	53%	38%
2000	58%	43%
1998	43%	29%
1996	55%	43%
Mean	**52%**	**38%**

V. Plan 1374C Eliminate s Minority Influence Districts

66. Minorities in Texas have considerable influence over the election of Members of Congress in general elections, constituting a crucial vote in districts where the Anglo vote is closely divided, even in elections with incumbent candidates seeking reelection. As indicated in Table 30, these districts include CDs 1, 2, 4, 9, 10, 11, and 17, with combined

Table 30

Minority Influence Districts in Texas

Congressional District Under Current Plan	Combined Black Plus Hispanic Population Percentage	Combined Black Plus Hispanic VAP Percentage	Incumbent	NAACP Score	Hispanic Leadership Conference Scores
CD 1	23.8%	21.4%	Sandlin	83%	82%
CD 2	22.9%	21.2%	Turner	72%	73%
CD 4	21.4%	18.7%	Hall	33%	18%
CD 9	35.9%	33.0%	Lampson	83%	85%
CD 10	44.4%	39.2%	Doggett	89%	82%
CD 11	32.5%	28.7%	Edwards	78%	82%
CD 17	23.6%	20.5%	Stenholm	61%	60%

NAACP and Hispanic Leadership Conference Scores, 107th Congress, 2001-2002

Hispanic and black populations ranging from nearly 20 percent of voting-age population to nearly 40 percent. Taken together they include a combined minority population of more than one million persons. Although, with the exception of District 10, these congressional districts usually vote Republican in statewide elections, Table 31 shows that virtually unanimous support for Democratic congressional candidates from minority voters, along with ticket-splitting by Anglos, has resulted in the election of Democrats in

general elections. As indicated in Table 31, in every influence district in every 2002 congressional election, the Anglo vote was closely divided between Republican and Democratic candidates. As a result, minority voters have been able to elect Anglo Democrats who usually represent their interests even in otherwise heavily Republican districts.

Table 31

Ecological Regression Estimates*
2002 Congressional General Elections
Anglo & Minority Voting

District and Voter Group	Percent for Democratic Candidate
Congressional District 1	
Anglo Voters	47%
Black Voters	99%
Hispanic Voters	NA
All Voters	56%
Congressional District 2	
Anglo Voters	56%
Black Voters	100%
Hispanic Voters	NA
All Voters	61%
Congressional District 4	
Anglo Voters	55%
Black Voters	100%
Hispanic Voters	NA

District and Voter Group	Percent for Democratic Candidate
All Voters	59%
Congressional District 9	
Anglo Voters	51%
Black Voters	100%
Hispanic Voters	NA
All Voters	59%
Congressional District 10	Uncontested
Congressional District 11	
Anglo Voters	43%
Black Voters	NA
Hispanic Voters	NA
All Voters	52%
Congressional District 17	
Anglo Voters	49%
Black Voters	NA
Hispanic Voters	100%
All Voters	52%

* All Democratic candidates were Anglo incumbents. In District 11, given the lack of minority concentration in precincts, ecological regression analysis was not used. Anglo voting was estimated by totalling the votes cast in the numerous precincts where at least 90% of the voting-age population is Anglo.

67. In the three closest elections, in CDs 1, 11, and 17, where the percentage for the Democratic candidate was 56 percent or less, Table 31 indicates that the Republican candidate won the Anglo vote and thus the minority turned the elections in favor of their candidates of choice. As indicated in Table 30, every Anglo Democrat, with the exception of Hall, has an NAACP and Hispanic Leadership Conference rating of 60 percent or more, as compared to a mean NAACP rating of 24.8 percent and a mean Hispanic Leadership Conference Rating of 6 percent for Anglo Republicans in Texas.

68. These influence districts are dismantled under Plan 1374C, with minority voters reallocated to districts in which they will have little opportunity to elect candidates of their choice in general elections. With respect to representatives elected from the influence districts in Plan 1151C, Table 32 indicates that 5 of the 7 Democratic incumbents are reallocated to decidedly more Republican districts. All of these 5 new districts under Plan 1374C are heavily Republican, two of them also include Republican incumbents, and none of them retains even 50 percent of the representative's former constituents from Plan 1151C. Representative Edwards has been reallocated to a very slightly more Republican district, but one that includes only 35.2 percent of his previous constituents. Representative Hall, who has the lowest NAACP score, is the only Member reallocated to a more Democratic district, but one that is still heavily Republican and retains only a third of his previous constituents.

Table 28

Ecological Regression Estimates
Anglo v. Hispanic Primaries and General Elections in 2002
Current Congressional District 15

Primary Elections						
	Anglo Voters			Hispanic Voters		
District	**% for Anglo Candidate**	**% for Black Candidate**	**% for Hispanic Candidate**	**% for Anglo Candidate**	**% for Black Candidate**	**% for Hispanic Candidate**
US Senate	41%	31%	28%	22%	13%	64%
Agriculture Commissioner	70%	NA	30%	13%	NA	87%
Land Commissioner	70%	NA	30%	26%	NA	74%
Mean	60%	NA	29%	20%	NA	75%

General Elections				
	Anglo Voters		Hispanic Voters	
Election	**% for Democratic Candidate**	**% for Republican Candidate**	**% for Democratic Candidate**	**% for Republican Candidate**
Governor	22%	78%	94%	6%
Supreme Court, Position 2	25%	75%	96%	4%
Court of Criminal Appeals, Place 1	22%	78%	94%	6%
Mean	23%	77%	95%	5%

VI. Turnout and Socio-Economic Differences for Anglos and Minorities

69. Data on general elections, which present a common base for comparison, show that for the period from 1996 to 2002, turnout rates for the Anglo voting-age population were substantially higher than turnout rates for the black and Hispanic populations. As indicated in Table 33, for 1996 to 2002, the mean, top-of-the-ticket turnout rate in general elections is 43 percent for Anglos, 32 percent for African-Americans, and 14 percent for Hispanics. The turnout rate for Hispanics remains well below the rates for blacks and Anglos even after adjusting for citizen voting-age population. These turnout differences are linked to socio-economic differences between Anglos and minorities that are documented in Table 34 for such standard socio-economic measures as education, income, poverty, unemployment, and availability of telephones and vehicles. Differences in socio-economic standing of the magnitude reported in Table 34 constitute not only a barrier to turnout, but more broadly restrict the relative resources required for full participation in the political process. Such resources include campaign finance and facilities; a recruitment base of well-educated candidates and campaign workers; and access to means of transportation and communication.

Table 33

Ecological Regression Estimates
General Election Turnout by Race
Top-of-the-Ticket, 1996-2002

Election	% of Anglo Voting-Age Population Voting	% of Black Voting-Age Population Voting	% of Hispanic Voting-Age Population Voting
1996 General	47%	36%	17%
1998 General	33%	24%	9%
2000 General	53%	40%	18%
2002 General	38%	28%	12%
Mean	**43%**	**32%**	**14%**

Table 34

Socio-Economic Statistics by Race and Ethnicity
2000 Census, Summary File 3

Measure	Anglos	Blacks	Hispanics
Percent Bachelor's Degree or Higher, Population 25+	30.0%	15.4%	8.9%
Median Household Income	$47,162	$29,305	$29,873
Per Capita Income	$26,197	$14,253	$10,770
Percent Persons Below Poverty	7.8%	23.4%	25.4%
Unemployment Rate, Civilian Labor Force	4.1%	10.5%	8.7%

Percent Households Without Telephones	1.7%	4.5%	6.4%
Percent Households Without Vehicles	4.5%	16.0%	10.8%

Conclusion

In several ways, proposed Plan 1374C has both the effect and the intent of impeding opportunities for minority voters in Texas to participate fully in the political process and to elect candidates of their choice to Congress. The Plan dismantles a majority-minority district in the Dallas/Tarrant region that, as acknowledged by the State's expert on voting rights, provides opportunities for black voters to elect candidates of their choice in both primary and general elections. It does so by intentionally fragmenting black voters and submerging them in overwhelmingly Anglo districts, subordinating traditional redistricting principles and making sure that these voters have no prospect of even influencing the election of congressional representatives. Plan 1374C likewise eliminates a Hispanic opportunity district in the area of current CD 23, leaving Hispanic voters in that region of the state submerged in a district in which they have no realistic prospect of electing a candidate of their choice to Congress. The plan achieves this end by intentionally splitting Webb County, with the result that about 100,000 largely Hispanic persons are excluded from the District, to be replaced by population from heavily Anglo counties. The Plan also dismantles seven districts across the state in which minority voters have significant influence over

the election of congressional representatives and reallocates the bulk of these voters to districts in which they have no such opportunities. Changes made to bolster the black concentration of a Houston area district (proposed District 9) may well have no practical impact on minority voter opportunities and the creation of a new majority-Hispanic district running from the Mexican border to Austin (proposed District 25) undermines Hispanic voting opportunities in neighboring District 15. On balance, the proposed Plan 1374C has significant, intentional, and detrimental effects on minority voter opportunities in Texas.

Dated: November 14, 2003

/s/

Allan J. Lichtman

Declaration of Ryan Robinson: Post-Census 2000 Demographic Change in Texas

The redrawn congressional districts of Plan 1374C by HB3 for the state of Texas are based on Census 2000 block-level population data; data that are now old and specious because of rapid and spatially uneven population surges and declines across the state, and additionally, due to changes in the sizes of ethnic groups—for the state as a whole and for communities within the state. It has been almost four years since the federal government conducted its decennial census, and in terms of demographics, a lot has changed in Texas since data sufficient to draw new districts were first made available on March 12, 2001.

Since April 1, 2000—the official Census day that all decennial census data are tethered to—the state of Texas has experienced enough population growth (almost a 1.0 million net gain as of July 1, 2002, according to the Census Bureau) to warrant the addition of two new congressional seats (based on an analysis by Election Data Services, a Washington consulting firm; please see link for Reapportionment Study at the company's web page electiondataservices.com/ home.htm). And here is where HB3 begins to foul out, demographically speaking. Now, in late 2003, the state's population growth since Census 2000 has easily exceeded 1.0 million persons because more than 16 months worth of additional growth has occurred since the Bureau's estimate of July 1, 2002. The redistricted HB3 map is based on old data that reflect a snapshot, a point along the state's growth trajectory that has long since passed.

Population growth comes from two basic sources, migration (the net difference between households moving into the state and households moving out) and natural increase, or the

difference between births and deaths. Currently, the state of Texas is experiencing rapid population growth from in-migration and from natural increase. According to the Census Bureau's 2002 population estimates program (please see Census.Gov.Popest.htm), Texas gets about half of its growth from in-migration and about half from natural increase. As the state continues to gain younger households in their prime child-bearing years and Hispanic families with their higher than average birth rates, Texas is poised to continue to grow enormously, even with attenuated in-migration levels.

Texas is receiving a substantial share of the nation's international immigration stream. Although the magnitude of this migration stream has diminished somewhat after the events of 9/11 and this nation's efforts to more effectively seal its borders, international immigration still contributes a substantial share to the state's overall population growth. This immigration stream is largely non-European, with major components from Asia and Latin America, and shows no sign of stopping anytime soon. Professor Stephan Klineberg at Rice University has outlined the structure of this immigration wave in recent works offered at: report.rice.edu.

The state's Hispanic share of total population is rising rapidly—increasing at an even faster rate during the past four years than it did during the 1990's. And herein lies another point of demographic perversion on the part of HB3—districts have been drawn under Plan 01374C using data that do not fully reflect the current size and spatial scope of the state's largest and most rapidly expanding minority community: Hispanics.

Because US congressional districts must be equal with each other in terms of total population size, the fact that the state

has grown markedly and spatially unevenly since April 1, 2000 means that the creators of the HB3 map would have to use current population information to achieve balanced districts. Because old data were used, the resultant districts are not balanced with each other in terms of population.

The enormous population growth that Texas has witnessed over the last three and a half years has not been homogenously spread across the state. Intra-state migration levels between cities and local household formation rates vary dramatically. Census Bureau estimates data reveal a highly uneven pattern of growth and localized decline. For example, looking at the Census Bureau's mid-year 2002 population estimates shows that the high-flyers of the past decade, places like Dallas and Austin, have seen a slow down in their growth rates, while urban areas like San Antonio (2.0% annualized) and El Paso (1.8% annualized) have taken over as the state's growth leaders (Census.Gov.Popest.htm).

The point here is that population growth is a spatially lumpy phenomenon, and using Census 2000 data to create congressional districts ensures that the districts will not be balanced with one another in terms of total population.

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I declare under penalty of perjury that the foregoing statements are true and correct. Signed this day, November 14, 2003.

Ryan Folmar Robinson
City Demographer, City of Austin

EXPERT REPORT OF RONALD KEITH GADDIE, PH.D.

Submitted for *Sessions v. Texas*

November 21, 2003

Introductory Statement and Credentials

My name is Ronald Keith Gaddie. I am a Professor of Political Science and Faculty Fellow in the Institute for Science and Public Policy at the University of Oklahoma in Norman, Oklahoma, where I also reside. I have served on the faculty of the University of Oklahoma since 1996. I was previously Research Assistant Professor of Environmental Health Sciences at the Tulane University School of Public Health and Tropical Medicine. Among the courses I teach at the University of Oklahoma are classes on American Politics, research methodology courses, elections and campaigns, and Southern politics.

I received my bachelor of science degree with major fields in political science and history from the Florida State University (1987), a master's degree in political science from the University of Georgia (1989), and a Ph.D. in political science from the University of Georgia (1993).

My principal research interests are in the areas of legislative elections; party competition and realignment; the impact of election laws, redistricting, and reapportionment on elections and voter participation; and the pursuit of political careers by politicians. My published research includes eight books, including Born to Run: Origins of the Political Career (Rowman and Littlefield, 2004); Elections to Open Seats In The U.S. House: Where the Action Is (2000, Rowman and Littlefield, with Charles S. Bullock, III); and The Economic Realities of Political Reform: Elections and the U.S. Senate. (1995, Cambridge University Press, with James L. Regens), and about 50 articles and book chapters in edited volumes, including American Politics Quarterly; Journal of Conflict Resolution; The Journal of Politics; Legislative Studies Quarterly; Social Science Quarterly; Political Research Quarterly; State and Local Government Review; and Women & Politics (a complete curriculum vitae accompanies this

Table 32

Reallocation of Representatives from Influence Districts in Plan 1151C to New Districts in Plan 1374C

Congressional District in Plan 1151C	Incumbent	% Democratic Statewide-1996-2002	Congressional District in Plan 1374C	Incumbent	% Democratic Statewide 1996-2002	Difference in % Democratic	% Core Retained From Plan 1151C
1	Sandlin (D)	44.4%	1	Sandlin (D)	39.0%	-5.4	40.1%
2	Turner (D)	46.0%	6	Turner (D) Frost (D) Barton (R)	36.8%	-9.2	Turner: 4.4% Frost: 21.6% Barton: 66.4%
4	Hall (D)	34.6%	4	Hall (D)	40.5%	+5.9	33.9%

9	Lampson (D)	48.8%	2	Lampson (D) Green (D)	40.4%	-8.4	Lampson: 47.7% Green: 1.1%
10	Doggett (D)	57.2%	10	Doggett (D)	36.8%	-20.4	40.3%
11	Edwards (D)	39.0%	17	Edwards (D)	38.9%	-0.1	35.2%
17	Stenholm (D)	36.3%	19	Stenholm (D) Neugebauer (R)	32.3%	-4.0	Stenholm: 30.9% Neugebauer: 57.5%

report). I act as a peer reviewer of research for a variety of national and international academic journals and presses, and I am a member of the editorial board of Social Science Quarterly.

I have acted as an expert witness or litigation consultant in legislative redistricting and voting rights lawsuits in Georgia, Illinois, New Mexico, Oklahoma, South Dakota, Texas, Virginia, and Wisconsin and have been admitted as an expert in state and U.S. Federal courts. My most recent clients include the attorneys general of Virginia and Texas. In this matter, I have been hired by Andy Taylor of Andy Taylor and Associates, to act as an expert on behalf of the Attorney General of Texas. I am being compensated at a rate of $150.00 per hour for my work in this matter.

1. Introduction

The following is an overview assessment of the congressional district map passed by the Texas legislature this past October, HB 3 (1374C). The plan is evaluated on a variety of dimensions: the equality of distribution of population to guarantee one-person, one-vote; the division of traditional political units (counties); the compactness of districts in the plan; the treatment of Hispanic and African-American minorities; and the general competitiveness of the districts in the plan.

The map created in HB-3 enhances the strength of the Republican Party in Texas congressional elections by creating safe districts for both parties. In the process, the map displaces several incumbent Democratic congressmen. The map is superior to the 1991 legislature-enacted map on dimensions of plan compactness and the splitting of counties. The map maintains minority access through the creation of eight majority-minority Hispanic districts (seven of which should perform for Hispanic voters) and three districts of

over 45% citizen voting age population where black voters control both the Democratic primary and the general election by virtue of their turnout and cohesion.

2. One Person, One Vote.

The population of Texas in the 2000 census was 20,851,820. The state was allocated 32 congressional seats in the subsequent congressional reapportionment. The ideal district population is 651,619.375, or 651,619 with twelve whole persons left over.

The 32-district plan enacted by the federal panel in *Balderas v. Perry* created 20 districts with a population of 651,619 and twelve districts with a population of 651,620, with a population range of one. The same distribution of population is present in the map advanced in HB-3. This constitutes the most perfect distribution of population possible for a 32-district plan in Texas. The average deviation from the mean is .46875 persons, or less than .000001% of the ideal population. All population figures are based on the 2000 census.

3. Splitting Counties.

Counties are creatures of the state. They can be created, consolidated, or eliminated. Despite the shrinking autonomy of counties in an expanding federal system, counties are still strong sources of political and social identity, and county lines have historically been considered in the crafting of legislative boundaries. Redistricting plans in the early 1990s in a variety of states, including Texas, were criticized from a variety of quarters for extensively dividing counties with relatively low populations, often as part of an effort to craft majority-minority districts. The Texas congressional plan of 1996 was the residual of such an effort, dividing thirty-three of 254 Texas counties among two or more congressional districts.

Six of those divisions are unavoidable, due to the very large populations of Bexar, Dallas, El Paso, Harris, Tarrant, and Travis counties. These counties have populations greater than the ideal population of a congressional district, therefore they will necessarily be divided. Other divisions may be made for political reasons, or to satisfy the desire for perfect population apportionment in the redistricting plan.

The *Balderas* court map reduced the number of county divisions from the previous legislative map, dividing 23 counties into more than one congressional district, including the six major urban counties. The divided counties are Bastrop (14, 21), Bexar (20, 21, 23, 27), Brazoria (14, 22), Collin (3, 4, 26), Dallas (3, 5, 24, 30, 32), El Paso (16, 23), Fort Bend (22, 25), Garza (13, 17), Harris (7, 8, 18, 22, 25, 29, 31), Hays (14, 21), Hidalgo (15, 28), Hunt (1, 4), Kaufman (4, 5), Kleberg (15, 27), Lamb (13, 19), McLellan (5, 11), Montgomery (2, 8, 9), Nacagdoches (1, 2), Nueces (15, 27), Tarrant (6, 12, 24, 26), Travis (10, 21), Williamson (11, 31), and Wise (17, 26).

The map created in HB-3 divides 28 counties into more than one congressional district, including the six major urban counties. The divided counties are Archer (13, 19), Bastrop (10, 15), Bexar (20, 21, 23, 28), Brazoria (14, 22), Burleson (10, 17), Cameron (15, 27), Cass (1, 4), Collin (3, 4), Comal (21, 28), Cooke (13, 26), Dallas (3, 5, 24, 26, 32), Denton (24, 26), El Paso (16, 23), (Fort Bend (9, 14, 22), Galveston (14, 22), Harris (2, 7, 9, 10, 18, 22, 29), Hays (21, 28), Hidalgo (15, 25), Liberty (2, 8), Limestone (6, 17), Nolan (11, 19), Robertson (17, 31), San Patricio (15, 27), Sutton (11, 23), Tarrant (6, 12, 24, 26), Trinity (6, 8), Travis (10, 21, 25), and Webb (23, 28). This number is an increase over the *Balderas* court map, though it is still fewer county divisions than have been present in the previous, legislature-crafted congressional map for Texas used in the 1992 and 1994

elections..

4. Compactness.

Two measures of compactness were applied to districts in plan 1034C: the Perimeter-to-Area measure and the Smallest Circle score. These measures were regularly offered in post-*Shaw* litigation of the 1990s. In the metric used by the Texas Legislative Council to measure compactness, high scores indicate less-compact districts. The two principle scores used are:

> ***Perimeter-to-Area*** (PTA) measure compares the relative length of the perimeter of a district to its area. It is represented as the ratio of the area of a circle with the same perimeter as the district to the area of the district.
>
> ***Smallest Circle*** (SC) scores measure the ratio of space in district to the space of the smallest encompassing circle: a value of one indicates perfect compactness and is achieved if a district is a circle.[1]
>
> The average Perimeter-to-Area score for the *Balderas* court map is 5.065, with a median PTA score of 4.650 (see Table 1). The average Smallest Circle score for the plan is 2.750, with a median Smallest Circle score of 2.600 (see Table 2).

The map in HB-3 has an average Perimeter-to-Area score of 6.416, with a median PTA score of 6.550 (see Table 1). The average Smallest Circle score for HB-3 is 3.516, with a median Smallest Circle score of 3.100 (see Table 2).

Overall, the new congressional map is less compact than the previous, court-drawn map. But, as indicated by the data

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[1] These definitions are the same as those found on the Texas Legislative Council website.

in Tables 1 and 2, it is more compact than both of the previous two congressional maps crafted by and adopted by the state legislature of Texas on the perimeter-to-area score, and more compact on average than the 1991 map on the Smallest Circle score (see Tables 1 and 2).

5. Minority Districts

The map in HB-3 creates eleven districts which either have racial or ethnic majorities, or in which minority voters exercise control over election outcomes. Eight of these districts are Hispanic-majority voting age population districts, and three of these districts have African-American populations which constitute over 45% of the citizen voting age population. Seven of the eight Hispanic districts (all but district 23) and all three African-American districts should perform for the predominant minority group in primaries and general elections. Summary population data on Hispanic population for each district appears in Table 3; population data for the African-American districts appears in Table 4.

District 15

District 15 in HB-3 includes 60.0% of the population of district 15 in the *Balderas* court map. The district has a 64.0% Hispanic voting age population (58.5% citizen VAP), and a Spanish surname voter registration level of 56.7%.

The district is generally a Democratic district. Republicans did attain 49.8% of the weighted two-party composite vote in the district boundaries in 2000, but the GOP 2002 composite vote was 44.3% (these data for all districts appear in Table 5). Hispanic voters constituted an estimated 81.9% of the Democratic primary voter turnout in 2002, and between 37.5% and 39.1% of the voter turnout in the 2002 general election.

Hispanic voters generally elect their candidates of choice

within the boundaries of the district. An examination of thirteen statewide primary and general elections featuring minority and Anglo candidates since 1996 revealed that the Hispanic candidate of choice prevailed in seven of seven primaries and five of six general elections. The one loss occurred when 37% of the Hispanic vote supported a Hispanic Republican over an Anglo Democrat. The only statewide Republican candidate to carry this district in 2002, Comptroller Carole Rylander, ran five percentage points ahead of any other Republican statewide, taking 66% of the state vote. She narrowly carried District 15.

District 16

District 16 is unchanged from the configuration advanced in the Balderas court map. The district continues to be 74.8% Hispanic voting age population, 69.9% citizen VAP, and with a 67.5% Spanish surname voter registration level. The district is Democratic according to the composite election measures. The Hispanic candidate of choice won in all thirteen statewide primaries and elections examined.

District 20

HB-3 creates a San Antonio-based district 20 which is largely based on the district 20 from the *Balderas* court map. The district retains 85.2% of the previous district 20. The Hispanic voting age population is 63.6% of total, and the citizen VAP is 60.8%; Spanish surname voter registration is 59.9% of total.

The district is Democratic, with an average 2000 GOP statewide composite vote of 42.9%, and average 2002 GOP composite vote of 37.7%, and a 2002 GOP lieutenant-governor vote share of 36.9%. Hispanic voters are estimated to have constituted between 53.1% and 54.7% of the 2002 general election turnout in the district, and 86.1% of the voter turnout for the 2002 Democratic primary in the district.

The Hispanic candidate of choice carried the district in all thirteen statewide elections examined (seven of seven primaries and six of six general elections).

District 23

HB-3 creates a 50.9% Hispanic voting age population district 23. The district is 45.8% Hispanic citizen VAP, and 44.0% Spanish surname registered voters. The district retains 81.5% of the old district 23.

The district as designed is a generally Republican district. The 2000 GOP statewide composite vote is 63.5% (56.8% for 2002), and Republican David Dewhurst carried the district with 51.3% of the vote. Hispanic voters account for an estimated 32.0% to 34.5% of the 2002 general election turnout, and 91.5% of the Democratic primary turnout. Hispanic candidates of choice won all seven statewide primaries examined in the district, but none of the six Hispanic candidates of choice in general elections carried the district. In the six contested statewide Democratic primaries and 15 contested statewide general elections in 2002, Hispanic candidates of choice prevailed within the new district in six of six primaries but none of 15 general elections.

While the district allows for Hispanic control of the Democratic primary, it has become a more Republican district, and should become safer for Hispanic Republican Henry Bonilla, who has not been the candidate of choice of Hispanic voters. District 23 derives from a district which did not consistently perform for Hispanics before 2002.

District 25

District 25 is a new, safely Democratic Hispanic majority district. The district is 63.4% Hispanic VAP (55.0% citizen VAP) and has a 55.6% Spanish surname voter registration.

The district draws roughly a quarter of its population from old district 15, a quarter from old district 28, and about two-fifths from old district 10 in Travis County.

The district is safely Democratic. The 2000 GOP statewide composite is 37.8% (30.2% in 2002), and Republican David Dewhurst managed just 27.5% for lieutenant-governor in the district. Between 46.4% and 51.1% of the estimated 2002 general election turnout is Hispanic, and 74.6% of the 2002 US senate primary turnout within the district was Hispanic.

Hispanic candidates of choice carried seven of seven statewide primaries and six of six statewide general elections involving candidates of different ethnicity or race. In the 2002 contested statewide Democratic primaries and statewide general elections, Hispanic candidates of choice prevailed in five of six primaries and all 15 general elections.

District 27

HB-3 creates a district 27 which retains 86.6% of the district 27 from the *Balderas* court map. The district is 64.2% Hispanic voting age population (60.4% citizen VAP), and has a 58.0% Spanish surname voter registration.

The district appears to be generally Democratic. The GOP 2000 statewide composite is 49.7%, though the GOP composite for 2002 is lower, 44.4%, and the Republican lieutenant-governor carried 41.3% of the vote inside the district. Voter turnout was estimated at 40.2% to 42.3% Hispanic in the 2002 general election, and 71.8% Hispanic in the 2002 US Senate primary. Hispanic candidates of choice won seven of seven statewide primaries and five of six statewide general elections involving candidates of different ethnicity or race.

District 28

The district 28 created in HB-3 retains 46.5% of the core from the previous district 28 of the *Balderas* map; old districts 23 and 14 provide much of the new population. The district is 60.1% Hispanic voting age population (56.2% citizen VAP) and has a 54.3% Spanish surname voter registration.

The district is Democratic in its partisanship. The GOP 2000 statewide composite is 48.6% (but 41.1% for 2002) and the Republican lieutenant-governor carried just 38.3% of the vote in the district. Hispanics are estimated at between 45.1% and 47.9% of the 2002 general election turnout, and 87% of the 2002 Democratic primary turnout.

Hispanic candidates of choice carried a majority in all seven statewide primaries and all six statewide general elections involving candidates of different ethnicity or race.

District 29

HB-3 maintains district 29 in Harris County, but as an open seat. Anglo incumbent Democrat Gene Green is no longer resident in the district. The new district includes 80.6% of the district 29 from the *Balderas* court map. The district is 61.8% Hispanic voting age population (46.7% citizen VAP), and has a Spanish surname voter registration of 45.9%.

The district is Democratic in its voting. The GOP 2000 statewide composite is 42.4%, and in 2002 the composite is just 35.8%; the Republican candidate for lieutenant-governor, David Dewhurst, pulled 35.5% of the vote in the district in 2002. Hispanics are estimated to provide between 39.5% and 41.9% of the general election turnout in the district in 2002, and 74.4% of the US Senate primary election turnout that year. Hispanic candidates of choice carried six of seven

statewide primaries and six of six statewide general elections involving candidates of different ethnicity or race.

District 9

HB-3 creates district 9, in Harris and Fort Bend counties. It is something of a successor to the previous district 25, containing 46.5% of that district and also portions of district 7 (34.0%), district 18 (12.0%), and district 22 (7.5%). The district population is 36.5% African-American voting age population, 30.3% Hispanic voting age population (46.9% African-American citizen VAP and 16.6% Hispanic citizen VAP) with 13.7% Spanish surname voter registration.

This is a very safe, Democratic district. The GOP 2000 statewide composite vote for the district is 32.8% (30.2% in 2002) and the Republican candidate for lieutenant-governor polled 29.0% of the vote in the district in 2002.

It is a district which will be controlled by African-American voters and which will elect African-American candidates of choice. Black voters accounted for 97% of the Democratic primary turnout in 2002, and are estimated to have been between 68.8% and 69.3% of the general election turnout in the district in 2002.

African-American candidates of choice prevail in the district, clearly carrying seven of seven statewide primaries and six of six general elections in the district involving candidates of different race or ethnicity. In the 2002 statewide primaries and general election, the preferences of black voters prevailed in the district in all six contested statewide primaries and all fifteen statewide general elections.

District 18

HB -3 continues a successor to the historic district 18 in Harris County. The district contains 78.8% of the previous

district 18 from the *Balderas* court map, and 18.9% of the previous district 29. The district population is 40.3% African-American voting age population (48.6% African-American citizen VAP) and 32.2% Hispanic voting age population (19.7% Hispanic citizen VAP) with 16.0% Spanish surname voter registration.

This is a safe Democratic district. The GOP 2000 statewide composite vote for the district is 28.4% (26.0% for the 2002 composite) and the 2002 Republican candidate for lieutenant-governor received 25.0% of the vote.

This district will likely be controlled by African-American voters and will elect African-American candidates of choice. Black voters constituted an estimated 61.9% to 62.4% of the general election turnout in 2002, and 80.7% of the turnout for the 2002 Democratic US Senate primary.

In thirteen statewide elections featuring candidates of different race or ethnicity, the African-American candidate of choice prevailed inside the district in seven of seven Democratic primaries and six of six general elections. In 2002, black candidates of choice prevailed in four of six contested statewide Democratic primaries within the district (the two losses occurred under circumstances where the African-American vote appears to have narrowly divided) and African-American candidates of choice prevailed inside the district in all fifteen statewide general election contests.

District 30

District 30 in HB-3 is an African-American district in Dallas county. The district continues a district which has existed since 1992, and in its current configuration retains 73.7% of the previous district 30 from the *Balderas* court map. The district is 41.3% African American by voting age population (48.6% African-American citizen VAP) and 30.7% Hispanic voting age population (14.2% Hispanic

citizen VAP) with a Spanish surname voter registration of 12.5%.

Like districts 9 and 18, this is a safe, Democratic district, if not the most Democratic district in the congressional map. The GOP 2000 statewide composite is 26.6% (22.7% for the 2002 composite) and the Republican lieutenant-governor received 21.5% of the vote in the district in 2002.

African-American voters will likely control the primary and election in this district. African-Americans are estimated to provide between 65.7% and 66.0% of the 2002 general election turnout, and 85.1% of the 2002 Democratic US Senate primary turnout.

In thirteen statewide elections featuring candidates of different race or ethnicity, African-American candidates of choice prevailed with a majority in five of seven primaries, and six of six general elections (the two instances where black preferences did not prevail with majorities were in 1998, and featured low cohesion among black voters, compared to other, similar elections). In 2002, African-American candidates of choice prevailed within the district in all six contested statewide Democratic primaries, and in all fifteen statewide general elections.

Comparison of Performance of *Balderas* District 23 and HB-3 District 25

HB-3 includes a new congressional district (25) that enters the Rio Grande valley. The result is a new, seventh majority Hispanic congressional district in South Texas, whereas the *Balderas* court map created six such districts. As I noted in my discussion above, the district 23 of the *Balderas* court map was an inconsistent performer at best. In 2002 Hispanic candidates of choice did prevail in 13 of 15 statewide general elections in the district and six of six statewide primaries. But, from 1996-2002, in thirteen statewide elections

featuring candidates of different ethnicity or race, the Hispanic candidate of choice prevailed in all seven primaries, but just two of seven general elections. And, since 1992, district 23 and its predecessors have elected a congressional candidate who is not the candidate of choice of Hispanics. The revised district 23 has even less prospects of electing the Hispanic preference.

The new Hispanic-majority congressional district, 25, holds out greater prospects to perform than either version of district 23. The district had, in 2002, an estimated Hispanic share of general election turnout of 46% to 51% in the US Senate and governor's contests, compared to rates of 41.3% and 44.0% in the old district 23. Hispanic candidates of choice prevailed in all seven statewide primaries and all six statewide general elections featuring candidates of different ethnicity or race. Hispanic candidates of choice carried five of six statewide Democratic primaries in 2002, and all fifteen general elections.

District 25 should perform for Hispanic voters, and is a more-effective district for Hispanic voters than the previous district 23. The new district 23 likely does not perform for Hispanic voters.

6. Partisanship and Competitiveness in HB-3 (Plan 1374C)

Assessing the impact of changes to the existing congressional plan requires placing that plan in proper context. Those who have written about gerrymandering have generally agreed that the Texas congressional plan for the early 1990s was a very effective partisan gerrymander (Beachler 1998). In 1992, Democrats polled 51.1% of the congressional vote in Texas but won 70% of the seats (Murray and Attlesey 1999, 321). Since 1992, Republicans have steadily gained vote share in Texas congressional

elections, but, despite commanding a clear majority of votes, cannot translate those votes into a majority of seats.[2]

The 1996 redistricting in response to *Bush v. Vera* affected less than half of the state. Still, Democrats continued to retain the lion's share of Texas' congressional seats, even as the state continued to trend toward the Republican party in statewide and state legislative elections (Lamare, Polinard and Wrinkle,1998). The most recent congressional map, crafted by a Federal panel and derived from the 1996 map, produced an outcome where Republicans garnered a majority of the two-party congressional votes (54.9%), but Democrats won a majority of the congressional seats (17 of 32).

The new map is an effort to shift the balance of the congressional delegation of the state to reflect the Republican party's preeminence in state politics, as reflected in not just the congressional vote shares, but also the results of statewide elections (all of which have recently been won by Republicans) and state legislative elections which in 2002 were dominated by Republicans. To that end, the plan increases the number of districts where Republicans have an electoral advantage, displaces Democratic incumbents, either by pairing them together or with Republican incumbents in Republican-leaning districts, and creating open seats which constitute Republican opportunities.

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[2] Prior political science research indicates that single-member district systems typically pay a "bonus" of seats to the party winning the majority of votes; change is not 1:1 in translating seats into votes. Redistricting, especially partisan redistricting, attempts to maximize the return of seats for votes, further contributing to this phenomenon. Texas has a history of the majority party seeking to enhance its representative power through redistricting.

Competitive districts.

Competition is important to students of elections because it is widely believed that competition is central to the health of a democratic system. To that end, the competitive nature of electoral districts is important because competitive districts should encourage strong candidacies in both parties and healthy voter interest in campaigns.

Competitive, or marginal, districts have been identified using two thresholds. David Mayhew (1974) established 55% of the vote as the division between a marginal and a competitive election. He noted that, at mid-century, legislators who lost reelection had often won their previous election effort with less than 55% of the vote. Mayhew observed a decline of these marginal districts in the 1960s, and cautioned of implications from declining competitive incumbent elections and of the isolating of congressional turnover into the open seats.

More recent research has shifted the division between competitive and non-competitive elections to 60% of the vote (Jacobson, 1987; 1997) as the 55% threshold proved to have less of a relationship with subsequent incumbent defeat.

The challenge of analyzing competitiveness across congressional district plans arises from attaining an appropriate baseline. In Texas in 2001, the *Balderas* court used a form of the normal vote measure, reconstituted statewide elections within proposed congressional districts, to baseline and compare the partisanship of the congressional map. This approach is widely accepted by the experts involved in this matter, and it is the approach used here to facilitate comparison.

Using reconstituted elections from 2000 and 2002 (see Table 5) to examine the *Balderas* court map reveals the presence of between 6 and 10 safe Democratic districts,

between 2 and 5 marginal Democratic districts, one marginal Republican district, and between 12 and 19 safe Republican districts, using a 55% threshold for party safety (see Table 6). When a broader 60% threshold is applied, the result is between 3 and 7 safe Democratic districts, between 5 and 8 marginal Democratic districts, between 2 and 4 marginal Republican districts, and between 16 and 19 safe Republican districts (see Table 6).

By comparison, the HB-3 map creates between 7 and 10 safe Democratic districts, between none and 3 marginal Democratic districts, no marginal Republican districts, and 22 safe Republican districts, using a 55% threshold for party safety. Applying the broader 60% threshold, the result is between 4 and 7 safe Democratic districts, between 3 and 6 marginal Democratic districts, none or one marginal Republican districts, and 21 or 22 safe Republican districts (see Table 6).

Overall, using either the 2000 or 2002 composite vote, the number of Democratic leaning districts falls from 11 or 12 to 10, while the number of Republican leaning districts increases from 21 to 22. Using the 2000 composite vote and a 45-55% definition of competitive/marginal district, the number of marginal districts changes from 6 in the *Balderas* court map to 3 in the map created by HB-3. Using the 2002 vote composite and the 45-55% definition of competitive/marginal, the change is from 3 marginal districts to 0. Using the broader definition of marginality (the 40-60% band) and the 2000 vote composite indicates that there are ten marginal districts under the *Balderas* court map, and six such districts under the HB-3 map. Using the 2002 composite, the number of marginal districts changes from 9 to 4.

Competitive Balance and Responsiveness

As I described above, the *Balderas* court map and the HB-3 map contained an advantage for Republicans according to the statewide composite vote in 2000 and 2002. The HB-3 map eliminated many marginal districts, creating more and safer Republican districts and fewer and safer Democratic districts.

Table 5 contains data from the 2002 lieutenant-governor's contest, broken out by district for the *Balderas* Court map and the map created by HB-3. The lieutenant-governor's race was the closest statewide contest in 2002, and was won by Republican David Dewhurst with 52.9% of the two-party vote. The similarly-close 1998 lieutenant-governor contest was a popular benchmark for evaluating maps at trial in 2001, and it is a useful baseline for the purpose of evaluating HB-3 in comparison to the *Balderas* court map. District-level data on this contest appear in the last two columns of Table 5. Then, in Table 6, I break out the districts by competitiveness, based on the GOP two-party vote share for lieutenant-governor. As indicated by the figures in Table 6, the number of marginal districts using the 45%-55% definition of competitive/marginal is four districts under the *Balderas* court map (two each Republican and Democratic leaning), and the number falls to three such districts (all Republican) in the HB-3 map. The number of safe Republican districts increases from 16 in the *Balderas* court map to 19 in the HB-3 map, and the number of safe Democratic districts is reduced from 12 to 10.

Using the broader band of marginality (40% to 60%), the number of marginal seats increases from 11 in the *Balderas* court map to 15 in the HB-3 map. The number of GOP marginal districts increased from 6 to 14, while the number of Democratic marginal districts changed from 5 in the *Balderas* Court map to 1 in the HB-3 map. The number of

safe Republican districts changes from 12 to 8, while the number of safe Democratic districts is unchanged at 9 in both maps. Overall, the number of Democratic-leaning districts is reduced from 14 to 10.

HB-3 is not especially responsive to small changes in the voting baselines. Using the 2002 lieutenant-governor's contest – again, the Democrats' best statewide showing – as a baseline, responsiveness can be measured as the number of seats won by each party as the share of the two-party vote won by the GOP increases and decreases in one percentage point increments above and below the actual vote. This analysis was performed by first measuring the two-party vote share for lieutenant-governor within each congressional district, and ascertaining how many districts were carried by each party. Then, the vote in each district was increased (or decreased) at one-percent increments from the observed vote, representing a 1 percentage point change from the statewide average (a similar analysis appears in Professor Alford's report). This analysis was performed for both the new map and for the baseline *Balderas* court map. The responsiveness of the *Balderas* court map and the HB-3 map appear in Figure 1.

Figure 1 presents the plot of the seats won by Republicans based on the lieutenant-governor's race vote share in the district against the statewide vote share, for both maps. Based on the actual vote share, 52.9% Republican, Republicans won the majority of the vote in 18 districts, while Democrats carried the vote in 14 districts. When that vote share is increased by one percentage point across all districts, Republicans pick up an additional seat, for 19, and when the vote share is increased by another one percentage point, an another seat is gained. This seat share – 20 seats, or 62.5% of seats– holds through increases to at least 57.9% of the vote, or +5% per district. The districts similarly respond

in the other direction; initial reductions of the GOP vote share of minus one-percent and minus two-percent result in corresponding seat shifts; 50.9% of the GOP vote results in half of the seats for each party. An additional reduction of four points in the GOP vote share, to 46.9% of the vote, is required to drop the GOP seat share below half, and another two point reduction to 44.9% of the vote is required to elicit another seat shift to the Democrats. It is at two points in the distribution – at 43.9% or less of the vote for the GOP, and around 51% of the vote for the GOP – that we see Democrats winning seats out of proportion to vote share.

The HB-3 map creates a more pronounced Republican advantage in the map design. At any value for Republican vote share above 51.9% statewide, Republicans carry 68.75% of seats, or 22 of 32. Below 51.9% of the vote share, Republican seat share falls off with vote share, though it is only at 45.9% of the vote for the GOP or less (54.1% Democrat or more) that Democrats win a majority of the seats in the HB-3 map. A very efficient distribution of Republican votes exists in the map.

Open Seats and Incumbent Pairings

The map contains four instances of incumbent pairings and five open seats. Open seats are important to turnover in the U.S. House of Representatives. Since the 1970s, two-thirds of new members of Congress were initially elected in open seats (Gaddie and Bullock 2000). Open seats have about a one-in-three chance of switching party from the departing incumbent. Those districts are important in the election of women and ethnic and racial minorities, because the creation of the open seat eliminates the incumbent and her/his advantages. Typically open seats only occur due to death, resignation, retirement, or pursuit of higher office. In redistricting years, these seats also occur because states are allocated a new seat in reapportionment, or because map-

makers choose to pair incumbents. Such pairing most often happens when a state loses seats in reapportionment, but pairing also happens when there is no change in the number of seats in a state and even when a state gains representatives. While losing a seat necessitates pairing, it need not produce any open seats.

Four incumbent pairings occur in the HB-3 map (see Table 7). These occur in district 2 (Green and Lampson), district 6 (Barton, Turner, and Frost), district 7 (Bell and Culberson), and district 19 (Neugebauer and Stenholm). Of the nine paired incumbents, six are Democrats. Table 7 shows the partisanship of the new districts with paired incumbents, the incumbents paired in the new district, the partisanship of their old district, and the proportion of their old district they carry into the new district. All four districts are Republican districts which voted between 57% and 64% for Republican David Dewhurst for lieutenant-governor in 2002. Of the paired Democrats, four came from safe Democratic districts (less than 45% for Dewhurst), while one came from a district that voted less than 51% Republican for lieutenant-governor and the other (Stenholm) represented a safe, Republican district.

A total of five open seats are created by HB-3, assuming that incumbents choose not to relocate to run (see Table 8).[3] These open seats include districts 9, 25, and 29 which are safely Democratic constituencies with large minority constituencies, and districts 11 and 24, two new open, safely Republican districts in West Texas and the Dallas-Fort Worth metroplex, respectively. The three safely Democratic open seats are ones in which minorities will be especially well

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[3] For example, Representative Lloyd Doggett (D-10) has announced that he will seek reelection in the new district 25 should HB-3 be implemented

positioned to elect their preferred candidate with district 9 likely to elect the preference of a united African-American electorate while Hispanics, if cohesive, should be able to elect their preference in districts 25 and 29.

Incumbent Core Retention

In Table 9, data on incumbent core retention is presented. Incumbent core retention measures the percentage of the district the incumbent is placed in, that comes from the incumbent's previous district. As indicated in the table, the map results in an average core retention for all incumbents of 51.76%; the average differs by party, with Republican incumbents retaining over 61% of their old constituency cores, on average, while Democrats retained about 43% of their old constituency cores.

7. Summary

This, in sum, is a map that was designed by the Republican state legislature to advantage Republicans in congressional elections in the state of Texas. The map creates ten Democratic districts and twenty-two Republican districts; disrupts numerous Democratic incumbents from their constituencies; and pairs many Democratic incumbents in Republican districts with Republican incumbents. The map contains eight Hispanic-majority congressional districts and three congressional districts with over 45% African-American citizen voting age population.

The map does create more Democratic than Republican open seats, but does so by displacing Democratic incumbents. It is possible for the minority party to prevail in a majority of districts. The circumstances under which the Democrats might prevail would require either a dramatic increase in the Democratic vote statewide, relative to the recent performance of that party in Texas or Democratic congressional candidates who run well ahead of their party's

recent performance. On the basis of a relatively even division of the vote statewide, the map exhibits a decided Republican advantage in the underlying partisanship of most districts.

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TABLE 1: PERIMETER MEASURES OF CONGRESSIONAL DISTRICT PLANS

DISTRICT	1992P	1000C	Balderas	HB-3
1	6.29	7.30	5.3	3.8
2	7.25	8.60	5.9	8.8
3	21.74	5.50	3.5	5.7
4	9.62	10.60	8.9	4.7
5	8.93	8.50	6.3	7.1
6	40.00	37.50	2.8	7.2
7	7.81	4.00	2.7	5.7
8	10.42	11.40	3.7	4.3
9	9.43	5.20	4.7	6.8
10	3.08	3.20	2.1	7.0
11	3.10	3.20	3.5	4.0
12	16.67	16.90	1.9	2.2
13	5.38	5.40	2.7	5.0
14	9.62	9.80	4.6	6.9
15	7.69	7.90	8.5	11.6
16	4.65	4.70	3.8	3.8
17	2.62	2.60	2.7	5.9
18	90.90	6.60	8.5	8.9
19	6.17	6.20	4.3	6.4
20	7.69	8.10	7.1	7.3

DISTRICT	1992P	1000C	Balderas	HB-3
21	10.63	11.00	3.2	7.1
22	12.19	9.50	7.1	9.8
23	5.59	5.80	6.1	5.1
24	13.89	9.70	6.1	7.5
25	47.62	10.60	11.8	9.6
26	7.04	4.70	2.7	6.7
27	4.72	4.60	4.1	5.1
28	6.06	6.20	5.4	5.7
29	125.00	5.60	7.7	8.6
30	62.50	5.60	4.7	4.0
31	.	.	6.7	4.1
32	.	.	3.0	8.9
N	30	30	32	32
Mean	19.1433	8.2167	5.065	6.416
Median	8.3700	6.4000	4.650	6.550
Minimum	2.62	2.60	1.90	2.20
Maximum	125.00	37.50	11.80	11.60
Sd	28.0768	6.3296	2.345	2.116

TABLE 2: SMALLEST CIRCLE MEASURES OF CONGRESSIONAL DISTRICT PLANS

DISTRICT	1992P	1000C	Balderas	HB-3
1	2.71	2.70	2.3	2.2
2	1.86	1.80	1.9	4.3
3	3.47	3.10	1.7	2.4
4	4.15	4.00	4.9	2.5
5	3.17	3.10	2.5	3.0
6	4.76	4.80	1.9	4.4
7	2.99	3.40	1.9	2.6
8	3.13	3.00	2.9	2.2
9	3.40	2.50	2.5	3.7
10	2.32	2.30	1.9	4.2
11	2.43	2.40	2.1	3.1
12	2.64	2.60	2.0	1.8
13	2.87	2.80	2.9	3.1
14	2.70	2.60	2.0	3.9
15	5.21	5.10	5.0	6.5
16	5.10	5.10	2.9	2.9
17	2.45	2.40	2.0	4.4
18	2.78	2.90	2.8	2.2
19	5.08	5.00	2.9	3.4
20	3.01	3.00	2.9	3.0

DISTRICT	1992P	1000C	Balderas	HB-3
21	4.52	4.50	1.8	2.8
22	2.55	2.40	2.4	3.4
23	4.31	4.20	4.2	3.8
24	2.95	2.90	3.1	3.4
25	5.08	4.40	4.4	8.5
26	2.40	2.40	1.8	5.2
27	3.51	3.20	3.1	3.1
28	3.85	3.80	3.7	5.0
29	5.15	2.60	2.8	3.1
30	4.12	2.60	2.7	2.3
31	.	.	3.8	3.2
32	.	.	2.3	2.9
N	30	30	32	32
Mean	3.4890	3.2533	2.750	3.516
Median	3.1500	2.9500	2.600	3.100
Minimum	1.86	1.80	1.70	1.80
Maximum	5.21	5.10	5.00	8.50
Sd	1.0142	.9479	0.906	1.357

TABLE 4: BLACK ACCESS DISTRICTS, HB-3

District	BlackVAP, *Balderas* Map	Hispanic VAP *Balderas* Map (SSVR)	Black VAP, HB-3	Hispanic VAP, HB-3 (SSVR)
18	42.1%	29.1% (14.2%)	40.3%	32.2% (16.0%)
30	40.3%	27.7% (11.4%)	41.0%	30.7% (12.5%)
9			36.5%	30.3% (13.7%)

TABLE 3: DATA ON HISPANIC VAP AND SPANISH SURNAME REGISTRATION

	VAP	VAP	CitizenVAP	CitizenVAP	SSVR	SSVR
DISTRICT	Balderas	HB-3	Balderas	HB-3	Balderas	HB-3
1	6.0	7.5	3.3	3.9	2.0	2.9
2	7.7	11.3	5.2	8.1	3.3	6.7
3	12.9	15.3	7.5	8.4	5.9	6.3
4	7.7	6.7	4.1	3.9	3.1	2.7
5	15.3	11.1	9.3	7.0	7.2	5.3
6	11.7	13.9	8.5	8.8	7.3	7.1
7	23.3	16.0	14.0	10.4	11.4	8.4
8	11.6	8.0	7.8	5.2	7.1	4.0

	VAP	VAP	CitizenVAP	CitizenVAP	SSVR	SSVR
DISTRICT	**Balderas**	**HB-3**	**Balderas**	**HB-3**	**Balderas**	**HB-3**
9	12.9	30.3	9.7	16.6	8.5	13.7
10	29.0	16.8	21.9	12.0	18.9	9.1
11	14.1	25.3	11.6	21.8	9.5	19.3
12	17.1	20.4	11.7	13.7	9.5	11.3
13	17.9	14.6	14.8	11.8	11.9	9.4
14	28.4	22.1	25.4	18.7	20.3	14.0
15	**74.3**	**64.0**	**69.3**	**58.5**	**67.0**	**56.7**
16	**74.8**	**74.8**	**69.9**	**69.9**	**67.5**	**67.5**
17	16.6	13.1	14.5	9.8	12.1	7.6
18	29.1	32.2	17.8	19.7	14.2	16.0
19	29.6	24.8	26.8	22.9	24.2	19.9

	VAP	VAP	CitizenVAP	CitizenVAP	SSVR	SSVR
DISTRICT	Balderas	HB-3	Balderas	HB-3	Balderas	HB-3
20	**64.3**	**63.6**	**61.6**	**60.8**	**61.5**	**59.9**
21	15.2	16.2	13.6	14.8	11.4	12.9
22	18.0	18.3	15.2	15.1	12.8	12.9
23	**63.0**	**50.9**	**57.4**	45.8	**55.3**	44.0
24	33.6	15.8	20.8	10.8	18.0	8.8
25	30.7	**63.4**	18.6	**55.0**	15.2	**55.6**
26	10.0	12.5	7.0	7.8	5.3	5.8
27	**67.5**	**64.2**	**63.5**	**60.4**	**61.6**	**58.0**
28	**65.7**	**60.1**	**61.4**	**56.2**	**59.6**	**54.3**
29	**58.2**	**61.8**	42.8	46.7	42.5	45.9
30	27.7	30.7	14.2	15.5	11.4	12.5

	VAP	VAP	CitizenVAP	CitizenVAP	SSVR	SSVR
DISTRICT	**Balderas**	**HB-3**	**Balderas**	**HB-3**	**Balderas**	**HB-3**
31	14.9	14.2	11.6	12.0	9.1	9.9
32	24.1	31.4	11.0	16.1	8.3	13.3

VAP and Citizen VAP figures are from the 2000 census; Spanish Surname Voter Registration is from the 2002 election cycle.

TABLE 5: GOP COMPETITIVENESS IN DISTRICTS FOR THE *BALDERAS* COURT MAP AND HB-3

		2000	2000		2002	2002		'02LGV	'02LGV
DISTRICT		**Balderas**	**HB-3**		**Balderas**	**HB-3**		**Balderas**	**HB-3**
1		60.9	64.9		58.1	63.0		51.3	55.1
2		59.0	61.6		56.4	60.6		50.9	57.2
3		73.3	71.1		72.4	70.0		67.3	65.2
4		68.5	64.2		68.1	63.0		62.4	58.0
5		60.8	64.9		59.6	64.2		55.1	58.6
6		66.2	65.6		65.2	64.1		60.4	58.7
7		68.7	70.2		69.2	70.2		64.2	64.0

		2000	2000		2002	2002		'02LGV	'02LGV
DISTRICT		Balderas	HB-3		Balderas	HB-3		Balderas	HB-3
8		77.7	67.0		78.6	66.6		74.6	62.8
9		53.9	32.8		52.2	30.2		48.9	29.0
10		46.6	66.0		40.0	63.5		32.9	56.4
11		64.6	71.7		62.8	69.8		58.1	61.5
12		66.4	63.6		66.3	63.0		61.3	58.0
13		71.9	71.0		69.4	68.9		62.5	62.3
14		63.2	62.5		60.2	61.0		49.3	52.7
15		46.0	49.8		38.3	44.3		35.8	39.3
16		42.8	42.8		35.6	35.6		38.4	38.4
17		68.6	64.5		67.2	64.0		58.2	58.6
18		26.5	28.4		24.8	26.0		23.6	25.0

TABLE 6: COMPETITIVE DISTRICTS

Mayhew Marginals

	Safe Rep.	**Competitive Rep.**	**Competitive Dem.**	**Safe Dem.**
'00 Statewide				
Balderas	20	1	5	6
HB-3	22	0	3	7
'02 Statewide				
Balderas	19	1	2	10
HB-3	22	0	0	10
'02 Lt. Governor				
Balderas	16	2	2	12
HB-3	19	3	1	9

Assumes a district is competitive at between 45% and 55% of the vote.

Jacobson Marginals

	Safe Rep.	Competitive Rep.	Competitive Dem.	Safe Dem.
'00 Statewide				
Balderas	19	2	8	3
HB-3	22	0	6	4
'02 Statewide				
Balderas	16	4	5	7
HB-3	21	1	3	7
'02 Lt. Governor				
Balderas	12	6	5	9
HB-3	8	14	1	9

Assumes a district is competitive at between 40% and 60% of the vote.

TABLE 7: INCUMBENT PAIRINGS IN HB-3

District	GOP Vote LtGov '02	Incumbent	GOP Vote LtGov '02, Old District	Core Retention
2	57.2%	Green (D)	32.5%	1.1%
		Lampson (D)	48.9%	47.7%
6	58.8%	Barton (R)	60.4%	66.4%
		Turner (D)	50.9%	4.4%
		Frost (D)	39.4%	21.6%
7	64.0%	Bell (D)	44.4%	18.8%
		Culberson (R)	64.2%	51.8%
19	60.1%	Neugebauer (R)	63.7%	57.5%
		Stenholm (D)	58.2%	30.9%

TABLE 8: OPEN SEATS

District	GOP LtGov'02	GOP 2000 Comp.	GOP 2002 Comp
9	29.0	32.8	30.2
11	61.5	71.7	69.8
24	63.2	69.1	67.6
25	27.5	37.8	30.2
29	35.5	42.4	35.8

TABLE 9: INCUMBENT CORE RETENTION

District	Incumbent	Core Retention	District	Incumbent	Core Retention
1	Sandlin (D)	40.1	17	Edwards (D)	7.4
2	Green (D)	5.5	18	Jackson-Lee (D)	78.8
	Lampson (D)	1.1	19	Neugebauer (R)	57.5
3	Johnson (R)	80.8		Stenholm (D)	30.9
4	Hall (D)	33.9	20	Gonzalez (D)	85.2
5	Hensarling (R)	62.5	21	Smith (R)	65.8

District	Incumbent	Core Retention	District	Incumbent	Core Retention
6	Barton (R)	66.4	22	DeLay (R)	70.4
	Turner (D)	4.4	23	Bonilla (R)	81.5
	Frost (D)	21.6	26	Burgess (R)	50.9
7	Bell (D)	18.8	27	Ortiz (D)	86.6
	Culberson (R)	51.8	28	Rodriguez (D)	46.5
8	Brady (R)	38.9	30	Johnson (D)	73.7
10	Doggett (D)	40.3	31	Carter (R)	31.0
12	Granger (R)	79.8	32	Sessions (R)	52.3
13	Thornberry (R)	88.3			
14	Paul (R)	43.7		Mean	51.76%
15	Hinojosa (D)	60.0		Mean Dem.	43.22%
16	Reyes (D)	100.0		Mean GOP	61.44%

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSIONS, ET AL	)	
	)	
VS.	)	Civil Action No.
	)	2:03-cv-00354
	)	
RICK PERRY, ET AL	)	

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THE ORAL DEPOSITION OF KEITH GADDIE
NOVEMBER 22, 2003

* * * *

Page 8

(Deposition began at 10:26 a.m.)

KEITH GADDIE,

the witness, having been previously duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, testified on his oath as follows:

EXAMINATION

BY MR. SMITH:

Q. Could you state your full name?

A. Ronald Keith Gaddie.

Q. And where are you employed?

A. I'm on the faculty of the University of Oklahoma in Norman, Oklahoma.

Q. And have you been retained in this litigation to appear as an expert witness for the State of Texas?

A. Yes.

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Q. Let's focus in a little bit again on the

24 issue of African-American access. You said already,
25 I think, that in District 24 in the current Map

Page 32

1 1151, African-Americans are in control of Democratic
2 primary; is that right?
3 A. Where?
4 Q. In District 24 in 1151.
5 A. Yes. Yes.
6 Q. What is your estimate of the percentage of
7 the voters in the Democratic primary in that
8 district who are African-American?
9 A. I don't believe I have the exact number in
10 front of me. But it should be a number -- It is a
11 majority of the voters.
12 Q. Is it typically well over 60 percent?
13 A. I was going to say, I believe it's above 60
14 percent but not above 70.
15 Q. Is it also your understanding that the
16 African-American candidate of choice in that
17 district is consistently elected in the general
18 election?
19 A. Yes. The Democratic nominee is
20 consistently elected in the general election.
21 Q. So would you consider District 24 in the
22 current map a district in which African-Americans
23 access the political process?
24 A. Yes.
25 Q. Now, you also used a term in your report.

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1 The term is "perform." Look at Page 7, for example.
2 You're describing minority districts. And you say,

"Seven of the eight Hispanic districts and all three African-American districts" -- This is in 1374.
A. Yes.
Q. -- "should perform for the dominant minority group in primaries and general elections." As you use that term, does District 24 in the current map perform for African-Americans?
A. As I use that term, yes.
Q. Okay. So it is not your professional judgment that a district has to have an African-American majority to perform?
A. Yes.
Q. Mr. Hebert thinks there may be ambiguity in that answer. It is not your assessment, in other words, they don't have to have the majority; is that correct?
A. Restate the whole question. It will make us clear --
Q. African-Americans do not have to have a majority of the district in order for the district to perform for them; is that correct?
A. That's correct.

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Q. Can you give me an example of any occasion when African-Americans in the existing 24 were unable to have their candidate of choice elected in

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a general election?
A. Not from my analysis, no.
Q. Do you have an estimate of the percentage of the voters in general elections in current 24 who

		2000	2000		2002	2002		'02LGV	'02LGV
DISTRICT		Balderas	HB-3		Balderas	HB-3		Balderas	HB-3
19		73.3	72.1		70.5	69.0		63.7	60.1
20		44.0	42.9		38.5	37.7		37.5	36.9
21		72.5	66.9		70.8	63.8		61.4	54.7
22		68.1	67.2		67.0	65.9		62.5	61.7
23		58.3	63.5		47.5	56.8		42.8	51.3
24		46.1	69.1		41.9	67.6		39.4	63.2
25		49.2	37.8		48.5	30.2		44.4	27.5
26		74.0	62.4		74.2	62.4		69.6	58.9
27		48.9	49.7		43.3	44.4		40.9	41.3
28		41.0	48.6		35.2	41.1		33.9	38.3
29		39.4	42.4		32.7	35.8		32.5	35.5

		2000	2000		2002	2002		'02LGV	'02LGV
DISTRICT		**Balderas**	**HB-3**		**Balderas**	**HB-3**		**Balderas**	**HB-3**
30		31.5	26.6		27.1	22.7		25.8	21.5
31		70.3	67.3		69.3	65.1		61.5	58.5
32		66.4	65.5		65.9	64.3		59.0	57.6

The data in first two sets of columns are based on the weighted average of the GOP vote share for all statewide contested contests; the data for the last pair of columns is the two-party vote share for the 2002 Lieutenant-Governor's race.

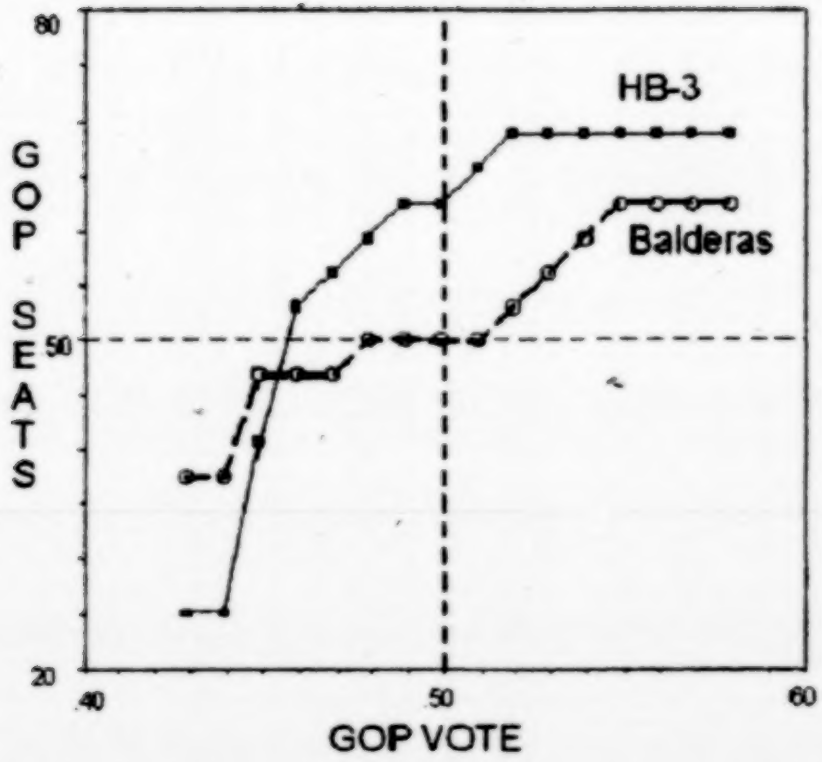

FIGURE 1: Seats-Votes Relationship, Balderas Court Map and HB-3 Map, Based on '02 Lieutenant-Governor Race Vote (Dewhurst v. Sharp, 52.9%-47.1%)

are African-American?
A. I have, but it's not in my report.
Q. I didn't ask you that. I just asked you what it is.
A. If I may refer to my documentation.
Q. I would appreciate it.
A. Thank you. 32.8 percent.
Q. And can you give us the -- the other figures for who's in that general election electorate for District 24?
A. You want the anglo and Hispanic shares?
Q. That's correct.
A. All right. Well, again, there are two different estimates here because the turnout figures are not identical for the U.S. Senate and for Governor. Would you like both?
Q. Yes, please.
A. Okay. For U.S. Senate, the turnout is 61.6 percent anglo, 32.8 percent African-American, 5.6 percent Hispanic. For the gubernatorial race, it is 60.6 percent anglo, and 32.5 percent

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African-Americans, 6.9 percent Hispanic. So anglo voters make up a solid majority of the voter turnout in the district.

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Q. So it's fair so say your understanding of the line-drawing strategy that was pursued in that part of Texas was that they wanted to make District 23 into a safer seat for Mr. Bonilla? And in order to do that, they felt the need to draw an

additional Hispanic majority district that would perform for Hispanics somewhere else in the state; is that right?

A. Bonilla had polled, I think, less than 23 percent of the voting to get him re-elected. My understanding there was a desire to bolster support for him in his ability to be re-elected. Because that district would become much more Republican, there would have to be compensation somewhere else. Yes.

Q. Did you ever draw any other comparisons between Hispanic districts in 1151 and Hispanic districts in the new proposed map?

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A. In my report? Or --

Q. No, in general.

A. In the process in general? When I would receive a map to examine, I would examine the ability of that district to perform based upon this analysis, which we were pulling information from before, the set of multiracial or multi-ethnic candidate races, for races that were most likely to show racial polarization in Texas and ascertain how often those districts performed on the basis of minority voters.

So one thing I would do is look at the existing district and see to what extent minority population had changed and see if the district had fallen off as a performer for minority voters.

Q. Now, did you ever -- Specific question I asked you was: Did you ever compare districts in 1151 and districts in 1374, the map as passed, old

15 versus new 15, for example, or old 27 versus new 27?
A. Yes.
Q. When did you do that? When did you do that?
A. Well, back in October, at the time that HB3

was advanced, in my reaction to Mr. Taylor, I would indicate the extent to which I thought the districts were performing compared to previous districts. The -- This would typically entail looking at --
Q. Yes.
A. I'm sorry.
Q. That's okay. I'm listening.
A. The -- This would entail looking at the reconstituted elections, looking at the polarization analysis, seeing how often candidates of choice won under this set of elections.
Q. And can you recall anything about the conclusions that you drew in your comparisons of the old and new versions of the other Hispanic majority districts in South Texas?
A. The other Hispanic districts would perform, yes.
Q. Did you conclude that they would be more marginal than they are in their current version?
A. They would become a bit more competitive, some of them, yes. But they still appear to be performing minority voters.
Q. Now, District 15, referring to Page 8 of your report, is the district in which the estimate that you got was that as re-drawn, it will have

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between 37.5 percent and 39.1 percent of the voter turnout in the general elections, Hispanics?
A. Yes. That's true.
Q. And can you tell me why you nevertheless concluded that as re-drawn it would be a performing district?
A. Because candidates of choice were being elected in the general election and in the primary.
Q. And can you tell me as it previously existed, was -- did the Hispanic share of the voter turnout in that district exceed 50 percent?
A. Could you please repeat the question? I didn't catch the first half of what you said.
Q. District 15, as it existed in the current map, do the Hispanics get more than half of the voter turnout in the general elections in that district?
A. Yes, they do.
Q. So that district has been changed from one in which Hispanics have unilateral control in the general elections to one in which they have to count on coalitions of others in order to have their candidate of choice elected. Is that true?
A. Yes.

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Q. Let me ask you some questions about the next phase of your report, then. You have some discussion of history here when we talk about partisanship going back to the early 1990s. And you refer to the fact that at the top of Page 17 that "The most resent congressional map," meaning the

Balderas map, "produced an outcome of Republicans garnering a majority of the vote. The Democrats won the majority of the seats." Do you see that?

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A. Yes.
Q. Is it your opinion that the Balderas map is biased in favor of the Democrats?
A. No.
Q. Is it your opinion that the Balderas map favors the Republicans?
A. Maybe slightly.
Q. And what is your explanation for the fact that the Democrats won 17 congressional districts in the 2002 election?
A. Incumbency.
Q. And is it fair --
A. And the maintenance of the residual of the old map.
Q. Is it fair to say that 1374 is designed to overcome the incumbency advantages of the Democrats by adding additional bias to the map and eliminating the core constituencies of key Democratic incumbents?
MR. TAYLOR: Objection; form.
THE WITNESS: The HB3 map, Map 1374, does disrupt the relationships between Democratic incumbents and their constituencies. It does create more and more safer Republican districts and a set of very safe Democratic districts, yes.

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Q. (By Mr. Smith) Does it add bias to the map

relative to the bias that you identify in favor of Republicans in the Balderas map?

A. Yes.

Q. Do you have a prediction of how many seats the Republicans would win in the 2004 elections if the HB3 map is allowed to go into effect?

A. Yes. This is in my report in the section that we're discussing and also represented in Figure 1 of my report, which is a representation of the seat's vote curve.

Q. What is your prediction of how many seats will be carried by the Republicans in 2004?

A. Again, that depends upon the amount of the vote. Actual --

Q. It certainly does.

A. Yeah. I already told you, I want to make sure that I give you a completely correct answer.

Q. I appreciate that.

A. Yeah. Yeah. The -- Again, this number is not determinative and definitive. But let's make a couple of assumptions. We'll assume no incumbency effect. Okay? We'll assume the distribution of the votes throughout the state. It looks like the lieutenant governors vote, which is 52.9 percent

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Republican statewide. That would result in about 68 percent of congressional seats going to the GOP.

Q. Okay. Now, have you done any analysis of the 32 districts and the likely outcome in 2004 taking into account incumbency effects and the way in which 1374 responds to those incumbencies and effects?

A. No.

Q. Do you have any judgment sitting here today of whether the Republicans would, in fact, be able to carry 22 districts in 1374 in the next election?
A. Based upon a systematic analysis, no.
Q. How about not based on a systematic analysis? What's your best judgment?
A. There will be Republican gains from this map. How incumbents, such as Chet Edwards or Charles Stenholm, might perform in the new districts relative to their incumbency effects, I can't say. But they receive districts that are -- They already represent very Republican districts, would run again in very Republican districts.
Given the incumbency effects, the ability to raise money, I don't think the Republicans can sweep 22 seats, but I think the Republicans do make gains. Any number would be a

guess. But the pick-up would probably be in the neighborhood of three to four seats rather than seven.
Q. Now, you do identify in your report that there are 22 Republican seats in the Map 1374; is that right?
A. Yes.
Q. And you also refer to the concept of safe seats repeatedly.
A. Yes.
Q. Can you tell me, are there any of those 22 districts which you would describe as not being safe Republican seats?
A. Again, this depends upon the baseline we use to make the assessment. The data which this

analysis will be based on is in Tables 5 through 6, which is probably around Page 27 or 28 of the report.

Under the HB3 map, if we use either of the composites to estimate competitive districts using a 45 to 55 percent range for competitive district, there are -- there are no competitive Republican districts in the map and 22 safe Republican districts. If we use lieutenant governors vote, it is 19 safe Republican districts,

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three competitive Republican districts.

Q. But the lieutenant governor's vote, as we established before, is the high-water mark for the Democratic performance in recent elections; is that right?

A. Yes. I would say it's an indicator of the most competitive baseline. So it reflects an open-seat circumstance, assuming two highly competitive circumstances, sufficient financing, most competitive circumstance, this is our best guess of the vote.

Q. But you wouldn't, sitting here today, think that's a good way to actually appraise the competitiveness of any particular district in that race?

A. No. We look at multiple indicators. It gives us an indication of the performance of the district under its most competitive circumstances.

Q. Of those 22 Republican districts, can you tell me which district is the least safe for the Republicans?

A. Do you mean the least Republican? Or the

least safe for the Republicans?
Q. Can you explain to me what the difference between those two is?

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A. Well, if you ask me what the least Republican district is, that's District 30 in Dallas.
Q. No. Of the 22 Republican seats.
A. Oh, okay. This will take a moment. Which baseline did you want to refer to, please?
Q. Whichever one you think is appropriate.
A. What we'll do is look at the most competitive baseline, which is the lieutenant governor's race, and then we'll make comparison to the 2002 composite. Among the safe districts using the lieutenant governor's base baseline, the least safe of the safe districts is District 1 at 55.1 percent. If we use the 2002 composite, it's District 23 at 56.8 percent.

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Q. (By Mr. Smith) Okay. So let me take you through what you actually did here. Referring to the HB3 line, you took the lieutenant governor's race in 2002 in which the Republican candidate got approximately 53 percent of the vote. And you said at 53 percent of the vote, how many seats did -- in the new map do Republican's carry. And that came out to what?
A. It comes out to 68.75 percent of the seats.
Q. Is that 22 seats?
A. That sounds right, yes.

Q. Okay. And then you said, "Let's subtract and add one percent of the vote from each of the candidates in each of the districts," is that right?
A. Right.
Q. So you said, "How many seats do the Republicans carry if we -- instead of giving Dewhurst 53 percent of the vote, we subtract one percent at every district"?
A. Right.
Q. Okay. And you found that at 52 percent of the vote, done that way, they still get 22 seats?
A. Yes.

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Q. And then you found that at 51 percent of the vote, the Republicans carry 21 districts; is that right?
A. I think that's right, yes.
Q. And you found that at 50 percent of the vote, the Republicans carry 20 seats?
A. Let me check that. I think that's correct. The -- The reactiveness of the curve is discussed -- Here we go.
Yeah. This is all discussed on Page 21 of my report, and the full paragraph begins Figure 1 where I start off by discussing the Balderas map and how it reacts. The reactivity of the HB3 map is in the paragraph that begins at the bottom of the page and continues to Page 22. But, yes, that should be a fall-off from 20 -- to 22 to 21 to 20.
Q. Okay. So at 50 percent, you're saying they get 20 out of the 32 districts?
A. Yeah.

Q. Okay. And the same is true at 49 percent?
A. Uh-huh.
Q. And that at 48 percent, the Republicans carry 19 of the districts; is that right?
A. I think that's correct, yes.

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Q. Okay. And just for the record, at what percentage of the votes do the Republicans no longer carry half the seats in Plan 1374?
A. When they drop below 45.9 percent of the vote.
Q. Okay. Just for the record, what you found about the Balderas plan is that in a 50/50 statewide election, you would expect that each party would carry about half the seats?
A. Yes.
Q. Now, you have some discussion about open seats in -- on Pages 22 and 23.
A. Yes.

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WALTER SESSION, ET AL	*	Civil Docket No.
	*	2:03-CV-354
VS.	*	Austin, Texas
	*	
RICK PERRY, ET AL	*	

TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE PATRICK E. HIGGINBOTHAM
U.S. CIRCUIT JUDGE
AND
THE HONORABLE T. JOHN WARD
AND
THE HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGES

* * * *

December 11, 2003, 1:00 p.m. Session

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Page 117 [Charlie Gonzalez]

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Q. Several years ago you testified before this Court that there is a big difference between Hispanic citizen voting age population and what actually happens on election day, Hispanic turnout. Does that difference persist today?

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A. Unfortunately, it does.
Q. As a practical matter, what does that fact of

life have to do with the creation of Districts where Hispanics can elect a candidate of their choice?

A. What I would imagine, during the course of this trial you'll have a lot of figures bandied about, and it will be based on raw numbers, and raw numbers don't mean anything to the minority community.

If you just go with population figures. What's the Hispanic population of any particular area? That really doesn't translate to having an effective voice or ability to elect someone of your choice, because then you still have -- and I'm going to do this again, and I know that the lawyers are prepared for it this time, but this is something that political scientists did.

And what he does in his class, basically he holds up a piece of paper and he says, this is the entirety of the Hispanic population in Texas, for instance. And it looks good. It should be a powerful block of votes or whatever it is. But let's take voting age population. And so, now you fold in it half. Take citizenship, too, because in these numbers with the census -- and I'm not telling you everybody is a citizen, because we count non-citizens. We are not allowed to ask

during the census, citizenship. And then what you do after that is you go into registered voters, how many of the voting age population that are citizens are registered voters. Then you fold it again.

What really counts, though, is the next vote, and that is election day. What is the percentage of the Latino or Hispanic vote on election day of that registered number that show up, and that's when you fold it again. And that is probably more realistic. So

that's what you end up with.
And, I mean, it is -- this is a metaphor.
I'm trying to always tell people, you know, it's like
when you draw something, it's not to scale, well, this is
the same thing.

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Page 152 [Allan Lichtman]

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JUDGE HIGGINBOTHAM: My question is why --
I thought you were telling me that Lloyd Doggett would

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represent an Anglo candidate taken the -- taking that
District at the price of a choice of the Latinos.
THE WITNESS: I think that's quite
likely. As I said, he could pick up somewhere between 40
percent to the high 40s of the Latino vote.
JUDGE HIGGINBOTHAM: What kind of Latino
support has he had in his current District?
THE WITNESS: I think he has had a recent
significant Primary, in General Elections, of course, he
has had overwhelming Latino support. I may have his
Latino score. Let me look at that. I don't think he's
had a significant Primary. If you will give me a moment,
I have a table with scores on it.
JUDGE HIGGINBOTHAM: I thought he had
roughly the same scores.
THE WITNESS: 82 percent. So, his score
is very high on Hispanic leadership conference. He's got
a lot of money. He's an incumbent. I think a very --
and, you know, the Hispanic community, as Representative
Gonzalez pointed out, is kind of very geographically
split. It's at either end of this District with a big,
very long bridge in between them, and therefore, again,

in the totality of circumstances of the plan, because they're doing contradictory things, they're trying to protect Bonilla, they're trying to create a new Hispanic

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opportunity District, but they are also trying to eliminate Doggett, and those are incompatible objectives. And I think the sacrifice here will be Hispanics will lose 23 as a viable opportunity District. May well lose 25 as a realistic opportunity District because of its geographic configuration, and because of what's done to target Doggett, and at the same time haven't gotten to this yet, he substantially weakened current Congressional District 15 as Representative Gonzalez testified to and as the numbers show.

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JUDGE ROSENTHAL: You talked a little bit about expanding the prior witness' testimony about the effect of the new lines on existing Districts 27, 28 and 15.

THE WITNESS: I think I focused only on 15.

JUDGE ROSENTHAL: That's my point, in part. And you talked about the contrast between a minority opportunity District and a minority influenced District.

THE WITNESS: Yes.

JUDGE ROSENTHAL: Would you characterize the extent of the weakening of any or all of these

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Districts as moving them from the category of minority opportunity District to the category of merely a minority influenced District.
THE WITNESS: Not in 27 or 28. You come close in 15. I wouldn't say -- I certainly would not say it becomes only a minority influenced District, that's not right, but it moves it closer.
JUDGE ROSENTHAL: But you would -- by your answer, you would agree, then, that they stay in the category of minority opportunity Districts.
THE WITNESS: Yes. But with 15 pushed at the edge of that.
JUDGE ROSENTHAL: Thank you.

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December 12, 2003, 9:30 a.m. Session

Page 82 [Allan Lichtman]

* * * *

Q. Let's explore a little bit more about District 24 in Plan 1151C. You would agree with me, would you not, that there's not any cohesion between Black and Hispanic voters in that District in the Primary, correct?
A. What I said was that they do not share the same candidate of choice, that's right. Doesn't mean there isn't any crossover.
Q. Now, focusing on the General Election, minorities are cohesive in supporting Democrats because

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party affiliation unites Hispanic and African-Americans, isn't that true? Because otherwise they're really not cohesive in General Elections?
A. Presuming you understand party affiliation the

way I explained it. It has a history, and it has issues behind it, mathematically, that's certainly correct.

Q. Well, in fact, that was the answer that you gave two years ago in the Balderas case when one of the three judges asked you, isn't it?

A. It's the answer I've given every time.

* * * *

December 12, 2003, 3:00 p.m. session

Page 4 [Ron Kirk]

* * * *

Q. (By Mr. Hebert) Could you give the Court a little background about you, were you were born, educated?

A. I'm a lifelong resident of Texas. I was born right here in Austin, Texas in 1954. I was educated in Austin public schools, attended Austin College in Sherman, Texas, in which I did see cows and cattle guards. I came back to the University of Texas School of Law and received my law degree in 1979 and moved to Dallas then. Worked in private law practice and went to Washington with Senator Lloyd Bentsen, moved back to Texas in 1983, resumed my law practice.

Page 5

Q. And you presently live in the Dallas area; is that correct?

A. Yes, sir.

Q. And could you tell the Court a little bit about your political activities, basically starting from the earliest stage --

A. I was born --

Q. -- that you got involved?

A. -- into the political world, particularly given the time that I was born here in Austin. My parents were very much involved in civil and voting rights movement. My mother was a

schoolteacher. My dad worked in this building. It was still the Federal Post Office. I had the unique perspective of having held my mother and dad's hand while they marched and picketed to get rid of the poll tax and then 40 years had my mother sitting out there crying when I sworn in as Secretary of State. Ironically, my father was the first black employee in this building. He was the first black postal clerk in Austin, Texas. So I was sort of immersed in the political life. And one of the reasons I became a lawyer, because I believed at that time that most good things happening for African-Americans and Hispanics were because somebody sued somebody. And we were very hopeful that the men and women who sat on the bench would make sure that justice was done. Not withstanding what this State said, that the Constitution imbued

certain rights on all people. Irregardless of our color, those rights would be upheld. That's why I went to law school. That's why I got involved in politics.

I remained in politics, even as a lawyer. I told you I worked for United States Senator Lloyd Bentsen on his staff in Washington as a policy analyst. I was a researcher for the old Texas Legislative Study Group the entire time I was in law school.

In 1983, I became an attorney and lobbyist for the City of Dallas and spent six years going back and forth between Austin doing that. 1990, I got involved in Governor Ann Richards election campaign and later held a number of posts in her administration, including chairing the General Services Commission, and in April of 1994, I was appointed Secretary of State.

At end of that year, I went back to Dallas and ran for mayor of Dallas and was elected in May of 1995 and re-elected in 1999. In November of 2001, I had some sort of

19 blunt trauma head injury and woke up and thought that I could be
20 elected to the United States Senate.
21 (Laughter.)
22 And -- and I think you've heard quite enough
23 testimony, then, about how much better a candidate I was than
24 Morris Overstreet, at least --
25 (Laughter.)

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1 Probably has some to do with race. I've always
2 maintained it had something to do with looks, Your Honor, but
3 obviously at least in Southeast Houston and Tarrant County I did
4 a whole lot better than Morris Overstreet, but the end result
5 was the same. So today instead of sitting in Washington, I'm
6 here with you-all and thrilled to be here.
7 Q. Mr. Kirk, you -- you've campaigned in your latest
8 Senate race -- just to stick with that a minute. You've
9 campaigned throughout the State of Texas; is that not correct?
10 A. Yes, sir.
11 Q. And asked the TLC folks to put up the current map,
12 1151C with the focus on the Dallas and Tarrant County area.
13 You're familiar with the congressional districts there, are you
14 not?
15 A. Yes, sir. In fact, I lived -- when I returned to
16 Dallas in 1983, I moved into Congressional District 24 and lived
17 in that District for over 10 years.
18 Q. No. 24 --
19 A. And --
20 Q. I'm sorry. Go ahead.
21 A. No.
22 Q. District 24 is a District currently held by Congressman
23 Martin Frost?
24 A. Yes, sir.
25 Q. And District 30 on the map is currently held by

Page 8

Congresswoman Eddie Bernice Johnson; is that correct?
A. Yes, sir.
Q. Have you had occasion to campaign with Congressman Frost from the District 24?
A. Over the years, I have campaigned for him, and I was delighted to be able to campaign with him in this most recent race. While I was running for United States Senate, he was campaigning re-election.
Q. And what efforts did you make as a candidate when you went into Congressman Frost's district with specific attention to the minority communities?
A. Well, Martin Frost has represented that District for a number of years, has gained a very strong base of support among African-American and Hispanic voters because of his strong voting records, his stance in favor of affirmative action, Voting Rights Act, increased funds for education, openness and opportunities, and Martin has an incredible following and amount of respect among the African-American community. And he's one of the few Anglo Congress persons that I could go in and have him frankly validate me before Black voters in Ft. Worth. And his support was critical, I think, to the strength of the African-American turnout in both the Primary and in the Runoff in my election.
Q. What group in the current 24th do you believe dominates the outcome of elections within that --

Page 9

A. Well, at least this past election. I mean, I think some of the voting intensity had, I'd like to believe, had little bit to do with my being on the ballot in a District, I think the Congressman's testified only got about a 24 percent

African-American population. And the primary in '02, the African-American turnout was 60 percent of the vote. In the Runoff, the African-American vote was 70 percent of the total vote. So I think that shows how strong that vote is in that particular District.

Q. Are you familiar at all with the efforts made to increase voter turnout in that District, specifically targeted to African-Americans?

A. Yes, sir.

Q. What is your familiarity with that?

A. Well, I mean, I've been a part of it and turning that vote out and educating voters and making sure people are aware of the opportunities of vote, voter education, voter registration, voter communication, all of those -- those elements. And I don't want to make this sound like a Martin Frost sing-song, but a lot of that is done because of Congressman Frost's efforts throughout the year. He is one of the few Congress people that maintains an open, active political operation year round, and it's manifest in the strength, and I think the respect and the support he gets from the African-American community across Dallas/Ft. Worth.

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Q. There was a question raised, I believe it might have even been from the bench yesterday about why a -- if there's any explanation for why Congressman Frost has never had a Black opponent or a contested primary, for that matter. Can you offer any insight on that?

A. I can't speak to why he's never had a contested pri -- I mean, I'm sure all politicians would love to be able to state that we don't get contested if we do our job good, people think we're doing a good job. I'm not going to tell you why nobody's ever run against him. And I say this, hope it doesn't offend anyone else, but at least in the African-American community,

Martin is affectionately known as a Baptist Rabbi, is what we call him. And he has very much endeared himself to our community and we trust him and we respect him. And I know there's been a lot of speculation of whether that district, because of the strength, could elect an African-American candidate, and I believe we could.

But I do not believe that you could elect an African-American candidate, including perhaps myself, against Martin because he has worked so hard to gain the respect and to keep the trust of his constituents. If you do a good job, if you communicate with your constituents, if you vote on the issues that they care about, generally they'll let you go back again.

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Page 37 [Roy Brooks]

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Q. Good afternoon, Mr. Brooks.
A. Good afternoon.
Q. Can you please tell us how you're currently employed?
A. I am Precinct administrator for Tarrant County Commissioners Precinct No. 1.
Q. Tarrant County is right next to Dallas County in the area that Mayor Kirk just talked about, correct, sir?
A. That's correct.

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Q. Now, talking a little bit about the 24th and its politics, do you believe that African-Americans control the Democratic Primary?
A. Yes.
Q. Now, we've heard specifically on the State's cross-examination of Professor Lichtman. You were in the court for that, weren't you, sir?
A. Yes, I was.

Q. We heard a debate about that where the State basically suggested that maybe they did not -- that community did not control the Primary. I don't want to get into the numbers, either the State's --

A. My eyes glaze over when you start getting into regression analysis.

Q. But what I do want you to do is share with the Court your understanding based on your experience working with these communities over the past 30 years exactly why you believe the African-American community does control the primary in the 24th.

A. Let me give, you know, an anecdote. In the -- the general election in 1994, Congressman Frost faced a very serious challenge from an Anglo Republican candidate. And I was with Martin on election night in 1994. And he was sweating bullets.

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It was 9:00 o'clock, and he was behind. First time he'd ever been behind, so Martin was sweating.

I asked him where is southeast Ft. Worth. He said, those boxes have not come in yet. I said, relax, Martin. It's going to be all right. And, in fact, it was. He ended up winning that election by a substantial margin based upon the performance of the voters of southeast Ft. Worth. And that impact has continued to grow since 1994.

Q. And in the Primary itself, specifically, we have heard evidence that Congressman Frost is not facing many primary challenges. You've heard that testimony earlier today, sir?

A. Yes, sir.

Q. Okay. Let's talk a little bit about that. Would you say that Martin Frost has been the favored candidate of the African-American community?

A. Yes, sir.

Q. Okay. Why is it in your estimation, based on your experience and knowledge of that community that there have not

been primary challenges to Congressman Frost?
A. Because Congressman Frost serves our interests. His voting record as rated by the NAACP is up in the mid 90 percent. It's higher than some African-American Congress persons I could name. Martin works hard for the members of his District. He is compulsive about it. When you call his office, you get a response. Very often you get a response from him personally.

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He knows the issues of the District. He responds to his constituents.
And, you know, the African-American community is not stupid. We understand seniority. We understand the need for our Congressmen to be able to reach outside of the Congressional Black Caucus and form coalitions to get things done. We are proud of Martin Frost's ability to do that and his willingness to do it on our behalf.
Q. Now, if Congressman Frost retired, and I'm talking about now the current 24th and that became an open District, do you believe the African-American community would be able to elect a candidate of their choice to replace Congressman Frost?
A. If Congressman Frost were to retire and it were an open seat, I am certain that the African-American community would field qualified candidates and would elect one of them to the U.S. Congress.

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Page 48 [Ruben Hinojosa]

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Q. Are you familiar with the voting patterns in South Texas?
A. Yes, sir. I have been in 15 elections, and I understand how it works.
Q. Can you describe the difference between a Hispanic voting age population and the results on election day?

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A. Yes. I can tell you that the numbers in my area are about 88 percent Hispanic, and the numbers that come out to vote are far less. It is probably more common along the Texas border region from Brownsville to McAllen to Laredo to El Paso that in those areas in order to win an election, you need to have about 57, 58 percent or higher Hispanic voter age population because of the low turnout.

Q. And is this low voter turnout, which is historical in part, still continuing today?

A. I say that it has gotten better over the last ten years, but we are still looking at a very young population that is ten years younger than the national average. Ten years younger, making them about 26 average versus 36 nationally and that they're just now beginning to get interested in voting. And so it's going to take another ten years before we see the formidable numbers come up out to vote.

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Page 59 [Martin Frost]

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Q. Congressman Frost, what District do you represent?

A. The 24th.

Q. And how long have you represented the 24th District?

Page 60

A. I'm in my 25th year in congress.

Q. So you were elected in 1978; is that correct?

A. That's correct.

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Q. Now, you mentioned that the African-Americans were

critical to your election in 1994. Can you tell us about the circumstances of that rather difficult year for Democrats?

A. Well, that was the year that Republicans took over the House of Representatives and Democrats all over the country were defeated. And I ran very, very hard that year. I determined early on that -- I did some polling early on and determined that this was going to be a pretty tough year, and so I worked very hard. And as it turned out, the only areas that I carried were the African-American Precincts in Ft. Worth and the Hispanic Precincts in north Oak Cliff. I got 50 percent, just over 50 percent in Navarro County, so I split the vote in Navarro County.

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I lost everything else. I lost Ellis County. I lost Arlington. I lost Grand Prairie. I lost Duncanville. I lost Cedar Hill. I lost De Soto. I lost every part of my District except the African-American Precincts in southeast Ft. Worth and the Hispanic Precincts in northwest Oak Cliff. And I wound up getting about 52.7 percent of the vote, if I recall correctly. So it was a pretty close race.

Q. Now, in your current District, are minority voters an important part of your base?

A. Absolutely. My current District, the African-American community is 22 percent, the Hispanic community is 38 percent, and there's 5 percent Asian. So it's all total, about 65 percent minority. And they are absolutely critical in my current District. I couldn't be elected, I don't believe. I don't think a Democrat or anyone could be elected in that District without the support of the African-American community and the Hispanic community.

Q. And what's your understanding about the extent to which the African-American community controls the Democratic Primary in your District?

A. Well, it's -- from looking at the statistics, it's my understanding that the African-American share of the primary vote in my current is about 60 to 65 percent, so that the vast vote -- primary vote comes out of the African-American community. And that's really for two reasons. One, that Anglos

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by and large vote in the Republican Primary now in the Dallas/Ft. Worth area. Not a lot of Anglos vote in the Democratic Primary. And also, the -- while Hispanics are 38 percent, a lot of them are not citizens and aren't eligible to vote.

We have an interesting phenomenon in the Dallas/Ft. Worth area in that when recent immigrants from Mexico come into the Texas, they often skip over the border and go directly to Dallas/Ft. Worth or to Houston because that's where jobs are. And they don't -- and that's why we have such a high rate of noncitizens in the Dallas/Ft. Worth area. Because people have come up to work on construction jobs. People have come up to work in restaurants. And so the Hispanic turnout is -- while it's helpful to me obviously in the General Election, it's not a major part of the primary vote. Even though the numbers are there, but it's a fairly smart part of the primary vote.

Q. Do you have an assessment, Congressman, of whether your's is a District in its current form, that if you weren't running, an African-American candidate could win in?

A. Absolutely. I believe that if I were to retire or take an appointment in a new administration, should there be one, whatever, if I were to leave office that an African-American -- the African-American vote would determine the new nominee, and I believe that could well be an African-American. But clearly the

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choice of the African-American community would be the nominee.
Q. Do you --
A. And there are some very able African-American office holders in both the Dallas County part of District and the Tarrant County part of my district who would be very credible candidates, and I believe one of them probably would win the primary.
Q. Do you think such a candidate could beat you in the Primary if you were running again?
A. I think probably not. I think that I'm -- I've been in 25 years. I have a long record of service to the African-American community. I've had very strong support -- and to the Hispanic community. I had a Hispanic General Election opponent in the last election, and I got the overwhelming part of the Hispanic vote. I mean, he almost didn't scratch in the Hispanic community. And I believe that with my 25 years of seniority and my record of service to the community that I believe I could win, although it might be an interesting race.
Q. Do you have a view about why it is nobody has tried that?
A. I think because over a period of years, I have spent an inordinate amount of my time and my energy in the African-American community in my District. I have been involved in an enormous number of things to help the African-American community. I'll list some of those if you want me to.

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Q. Is it true that the District configuration for District 24 when it was drawn in 1991 was drawn for the purpose of protecting the incumbent?
A. I'll tell you how it happened. I'll be happy to answer that question. Basically, my colleague, my now colleague, Eddie

Bernice Johnson, felt very strongly about the creation of an African-American dominated in Oak Cliff, and she was chairman of the committee. And she drew that District. And then she drew the 24th District around that. And it was drawn in a way that I would have a chance of winning. It was not -- it wasn't as good

Page 93

a Democratic District as I had represented during the Eighties, but it was certainly drawn in a way that I would have a chance of winning, that's correct.

Q. Okay. So, the answer to my question is yes?

A. Yes.

Q. All right. Now, is it also true that the plan that the Court drew in 2001 is similar to the plan in 1991 to the extent that it protected incumbents like you in District 24?

A. I think that's correct. Two of the Judges are here that took part in that. I don't know what to put -- I don't want to make my conclusions, but I think that's correct. I read their opinion, and I think that if I remember correctly what they said was that there were senior members of the Democratic party and senior members of the Republican party and that it was in the State's interest that those senior members of both parties be protected. They didn't mention me by name, but I think I was one of the people they were talking about.

Q. What was your role in 1991 when the plan was drawn by the Legislature?

A. Well, as I mentioned earlier, I was part of a committee. Congressman Coleman from El Paso was the chair of the committee. I was a member of the committee, a Democratic member in delegations who worked together and took a plan down to Austin in April and presented it to the Speaker and ultimately it was given to the Lieutenant Governor also.

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Q. Is it your perspective that the plan that was created by the Legislature in 1991 was, to use your phrase, a bipartisan political gerrymander?

A. It preserved -- yeah. The answer is yes. It preserved the Districts of all sitting Republicans and all sitting Democrats. It -- unlike the plan that was -- the plan that was

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passed this time, it didn't try and do -- it did not try and do in any sitting member of either party.

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December 15, 2003, 1:00 p.m. Session

Page 17 [John Alford]

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Q. Well, let me ask you this. I will read you a quote about the '91 plan and see if you agree with it. I'm quoting from the Almanac of American Politics in 1994, and it says, and I quote, "Texas' 1991 redistricting plan wins the Phil Burton award for the decade for it's creatively drawn lines in unlikely places; for the convoluted boundaries of its Districts, which

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snake-like, seemed to be threatening to swallow each other; for the partisan affrontry (sic) which enabled the Democrats to protect all but one of their incumbents and to capture the State's three new seats as well; for the ingenuity with which White urban Democrats, long dependent on Black votes were given Districts where Democratic rural counties were substituted for urban Black neighborhoods." Do you agree with that?

A. I think it's a pretty fair characterization of the '91 Legislative plan.

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Page 24

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Q. Then let's quickly look at what the

Page 25

perimeter-to-area score is of some of the Districts in the plan that the Legislature just passed and how they compare here and whether that's of any concern to you. Do you have a chart in your expert report that would tell us what the perimeter-to-area score for District 15 is?

A. In 1374C?

Q. That's exactly correct.

A. That's 11.6.

Q. Okay. And what about District 25?

A. 9.6.

Q. And how about lastly, District 28?

A. 5.7.

Q. Okay. So wouldn't you agree with me that in the Districts that you have expressed an opinion, that race is predominating, mainly Districts 15, 25 and 28 in the new plan, that the perimeter-to-area scores are much more in the range of reasonableness than the kind of scores you would expect from Districts in the '91 plan that were shot down as unconstitutional by the Vera panel in 1996?

A. If we're focusing on the sense of raggedness of the perimeter, I don't think any of those Districts are troublesome in the raggedness of their perimeter alone.

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Page 53 [Richard Engstrom]

* * * *

Q. Let's now focus on District 15. And of the eight elections that you examined, were there -- were there any races in District 15 in the plan that the Legislature produced in which the Hispanic candidate lost?

A. No.

Q. All right. Now, would you agree with me that in District 15 that the Legislature drew, that that is one in which Hispanics have the opportunity to elect their preferred candidate?

A. Yes.

Q. In fact, your tables show eight out of eight times; is that right?

A. I just answered that question, I believe.

Q. Now, you would also agree in the Legislative Plan that District 27 is a District where Hispanics have the opportunity to elect their preferred candidate?

Page 54

A. Correct.

Q. The same is true in the Legislative Plan for District 28?

A. Correct.

Q. And the same is true for Districts 16, 20 and 25 in the Legislative Plan; is that right?

A. Also correct.

Q. Now, would you agree with me that if you make a decision to d.aw seven Hispanic Districts in the western and southern portion of the State of Texas, that it is possible that in doing so, some of the Hispanic

percentages in the adjoining Districts will decline?
A. In the adjoining -- I mean Districts that are not Hispanic?
Q. No. In the adjoining Hispanic Districts.
A. Oh, yes. Some of them will decline in their presence of Hispanics, sure, because you're creating an additional District.
Q. Focusing again on District 15, but asking a question about the Primary, not the General Election. With 56.7 percent registration for Hispanics, wouldn't you agree that District 15 in the Legislative Plan provides Hispanics with an opportunity to nominate out of the Democratic Primary?
A. Yes. I believe it would provide an opportunity

to nominate, yes.
Q. Wouldn't -- wouldn't you also agree that Plan 1374C is not retrogressive for Hispanic opportunities statewide as compared to 1151C?
A. Not retrogressive in terms of the opportunity to elect representatives of choice.
Q. Now let's shift focus and make a comparison between the new District 25 that the Legislature created and old District 23 which the Court drew. Would you --
A. 23?
Q. 23, yes, sir. So we're talking about new 25, old 23.
A. Yes.
Q. Would you agree with me that for all eight re-aggregated elections that you've studied, the margins of victory stated as a percentage are more favorable in each of the eight elections in new District 25 than in old District 23?

A. Yes.
Q. So would you agree with me that in new District 25 in the State's plan, that that is one in which a better opportunity exists for Hispanics to elect a candidate of their choice than old District 23 in the plan the Court drew?
A. Yes; in the sense that it was eight for eight.

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Q. Okay.
JUDGE HIGGINBOTHAM: In the sense of what? I'm sorry.
THE WITNESS: That it was eight for eight and the margins were higher, yes.
Q. (By Mr. Taylor) To follow up on that answer, when you're looking at the results of the eight elections in new 25 and comparing them with old 23, eight out of eight times the Hispanic-preferred candidate wins in new 25 and only five out of eight times does the Hispanic-preferred candidate win in old 23. Is that true?
A. That's correct.
Q. All right. Last question. On the demonstration plan -- I don't have it. Is it 1385, I believe, C. If you're -- if you're looking at how District 25 in the Demonstration Plan sizes up with District 25 in the plan the Legislature drew -- are you with me?
A. Yes.
Q. So, studying how does District 25 do in the Legislature's Plan and how does it compare and contrast with the performance of 25 in the plan that the GI Forum has put up as a demonstration plan? Wouldn't you agree with me that in all eight elections that you analyzed,

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the margins of victory for the Hispanic-preferred candidate in the demonstration District 25 is lower than the margin of victory in District 25 that the Legislature enacted?

A. Yes.

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Q. The fact that the Hispanic percentage of the General Election in new District 15 falls below 40 percent does not, in your opinion, render it an ineffective Hispanic opportunity District, does it?

A. No, it does not; because they win all eight

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elections and that includes, of course, the last four.

Q. So the most we can glean from that line of inquiry is that turnout in one election was under 40 percent, and certainly if they get their folks to the polls can increase in the future; is that true?

A. You mean the turnout could increase in the future?

Q. Right.

A. That's certainly possible.

Q. Okay.

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December 16, 2003, 1:00 p.m. Session

Page 40 [Jerry Polinard]

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MR. GUAJARDO: Your Honors, I offer Dr. Polinard as an expert on political science in South Texas.

Q. (By Mr. Guajardo) Dr. Polinard, we've asked you to focus on the electability of Hispanics, the ability of Hispanic candidates of choice in Districts 15, 27 and 25 in both the current plan and the proposed redistricting plan; is that correct?

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A. That's correct, sir.

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Q. Well, given all that you've testified to with regard to District 27, what general range or level of Spanish surname voter registration in your opinion is required so that Hispanics can effectively nominate and elect their candidates of choice?

A. I -- I have no magic number. That's going to vary -- vary by District. I will state the obvious, that if the Spanish surname voter registration percentage goes up, the opportunity goes up.

I think you become comfortable with

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opportunity Districts once you break into those 60 percent plus ranges.

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December 17, 2003, 1:00 p.m. Session

Page 125 [Royce West]

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Q. (By Mr. Cruz) Do you believe that if an African-American candidate ran against Martin Frost that Martin Frost might be likely to loose?

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A. It kind of depends upon who the person is. I firmly believe that if I decided to run against Martin Frost or a Dionne Bagsby decided to run, if a Domingo Garcia decided to run, that we would be viable candidates and could give Martin Frost a pretty good run for his money and could conceivably win.

Q. Senator, the terms you used were viable and conceivably, and what I'd like to ask is if you believe if any of the candidates you named or another African-American candidate run -- ran against Martin Frost in a Democratic Primary that that candidate would be more likely than not to win, greater than 50 percent chance of defeating Representative Frost?

A. Mr. Cruz, if I decided to run against Martin Frost, I could beat him.

Q. And of the other candidates you listed, do you believe it is more likely than not that they would defeat Martin Frost?

A. I think -- I don't know the strength of Dionne Bagsby. She's been a county commissioner in Tarrant County for years, and Martin has a majority of her District within his Congressional District, I believe, and I believe that if she decided to run, that she would also be a viable candidate. Viable candidate basically meaning having the financial resources in order to mount

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an election against an incumbent. I think that we could do that.

But we've decided not to, and the reason we've decided not to is because Martin is there, and he recognizes that if he does not look out for the interests

of our respective communities, that he could get someone to run against him. So he has taken care of our political interests in Washington. And as such, we're politically empowered, and we're effective as a result of his advocacy and representation of us, thus we've decided not to run. I mean, you know, he's the candidate of our choice in that District.

Q. Senator, you made several references to a viable candidate.

A. Yes.

Q. Are you aware of any viable African-American or Hispanic candidate that has run against Martin Frost in a Democratic Primary?

A. No, I'm not.

Q. Do you believe that if African-Americans and Hispanics worked together in Congressional District 24 that they could elect the candidate of their choice in the Democratic Primaries?

A. I believe that if African-Americans, Hispanics and Anglos work together that they could elect a

candidate of their choice, and we're doing that right now. And that's Martin Frost.

Q. Setting aside for a second Anglos and just focusing on minority voters in CD 24, do you believe if African-American voters and Hispanic voters in CD 24 worked together that they can elect the candidate of their choice in CD 24?

A. And when you say CD 24, you're talking about the current CD -- the Court --

Q. Yes, sir.

A. -- CD 24? Yes.

Q. All of these questions are focused under the –

under the current Court Plan, CD 24.
A. Yes.
Q. As a matter of practice in CD 24, do African-Americans and Hispanic voters vote together when faced with contested Democratic Primaries?
A. It kind of depends on what the race is. I mean, I think that it really depends upon what the race is.
Q. Is there any general tendency of which you're aware in CD 24 of African-American voters, whether they tend to vote together or whether they tend to oppose each other when they are voting in a contested Democratic Primary?

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A. For the Congressional seat or any race within the --
Q. Any race in that area.
A. Well, if you're talking about -- let me give you an example. I ran for District Attorney in Dallas County back in 1986. Part of Dallas County, at that point, was in the 24th Congressional District. And African-Americans and Hispanics voted for me for District Attorney. When I ran for the State Senator, I ran against two very good friends of mine, one being Gerald Larry who was a sitting State Representative and also Jesse Oliver. African-Americans and Hispanics voted for me.
So there are different instances where coalitions have been established and we've worked together in order to elect the person of our choice.
Q. Are you referring, in those instances, to Primary elections or General Elections?
A. Primary elections.

Q. Primary elections.
In a race where an African-American candidate is running against an Hispanic candidate, in your experience, do voters in CD 24, do Africans and Hispanics tend to vote together or do they tend to vote opposed to each other?

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A. Opposed to one another.
Q. In a race between an African-American and an Anglo candidate in a Democratic Primary, and we're focusing only on Democratic Primaries, not the General, do African-American voters and Hispanic voters in CD 24 tend to vote together or opposed to each other?
A. It kind of depends on who the candidate is and what the race is. I mean, it's kind of all over the board. It really depends on who the candidate is. There have been coalitions between African-Americans and Hispanics that where you have an African-American candidate and the White candidate are running against one another. I mean, that's my general sense of what goes on there.
Q. So you're not aware of a tendency that predominates one way or the other?
A. No. I have not researched that, and nor am I aware of a tendency that predominates one way or the other.
Q. Okay. We set aside -- we were going to set aside Anglo voters. I'd like to talk very briefly about Anglo voters and ask you --
A. Sure.
Q. -- in your experience, do Anglo voters in CD 24 tend to vote in a racially polarized manner that

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usually defeats a minority candidate?
A. Sometimes that has happened, yes. I'm trying to be more specific about when. The great -- it's more -- when you begin to look at CD 24, needless to say, there's a multitude of races, and I just can't filter all those races through my mind.
We have a pretty good coalition right now of African-Americans, Hispanics and Anglos working together. So I can't think of any specific instances, Mr. Cruz, where here recently I've seen that polarized voting as it relates to the Congressional District. Now, I'm pretty sure there are instances within the District itself where you have that polarized voting, but I can't tell you what those races have been.
Q. To make sure I understand your testimony, Senator, what you're saying, if I understand you correctly, is that Anglo voters do not vote in a racially manner such that they would usually defeat a minority candidate; is that fair?
A. I don't think that -- no. I did not say that. I don't think there is sufficient numbers to be able to do that at this point in time as relates to the Congressional District. But I cannot answer the question as it relates to specific races because I hadn't analyzed that. That would be best left to an expert to give you

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that analysis.
Q. Well, based on your knowledge of the area and the District, having run in the District and being familiar with other candidates in the District and other elections in the District, what I'm asking is for your

characterization of what usually happens.
A. Okay. And I don't know whether -- let me give you an example, and I don't know whether this particular race was in the 24th or whether it was in the 30th.
Lancaster Texas, where we had an African-American that was running for mayor of the city. That was an instance where you had a polarized vote and we thought the African-American had won, and it turned out a couple of days later he had lost, and it was polarized voting there.
You could probably look at some of the suburban communities within the 24th Congressional District and see that there's polarized voting between African-Americans and also Anglos. But realistically, you should do an analysis of it and have an expert do that. But my sense is is that certain portions of the 24th Congress District, you will have polarized voting.
Q. Based on your experience, does that usually happen or not?
A. It usually happens.

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Q. So usually Anglo voters will vote in a racially polarized manner in CD 24 against minority candidates?
A. No. Let me -- let me, again, make sure you understand. What I'm saying is, is that that's my sense. But realistically, what you have to do is to look at the numbers to make that determination. And that's in certain portions of CD 24 and not the entire Congressional District.
Q. So is it a fair characterization of your testimony that based on your experience with the District, both running and being familiar with candidates and the voters in the District, but with the caveat that

it's not based upon an analysis of the data and the statistics, that usually Anglo voters in the District will vote in a racially polarized manner against a minority candidate?

A. In certain --

MR. GRIFFIN: Objection, asked and answered.

MR. CRUZ: It's been answered both ways. I just want to know which way the answer is.

JUDGE HIGGINBOTHAM: Answer it one more time.

A. Okay. In certain portions of the District, that is correct.

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Q. (By Mr. Cruz) And for the District as a whole?

A. I cannot say that for the District as a whole because I don't have a general sense of that.

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Page 152 [Eddie Bernice Johnson]

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Q. Would you state your name for the Court?

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A. I'm Eddie Bernice Johnson.

Q. Congresswoman Johnson, I am going to give you an exhibit book so that you can refer to it as we go through. You are currently a United States Congresswoman in the 30th Congressional District?

A. Yes.

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Q. There's been some testimony that when you served

in the Senate you served on a committee dealing with redistricting.

A. Yes.

Q. What -- what committee did you serve on?

A. It was a subcommittee on Congressional redistricting 1991.

Q. Okay. And what was -- tell us how that committee was set up, what your role was.

A. I was appointed by the Lieutenant Governor to chair that subcommittee for Congressional redistricting and there was another member who chaired the Texas Senate redistricting.

Q. When was the 30th Congressional District created?

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A. In 1991.

Q. And what was the impetus or political will, or what was going on in the State or in the Dallas area that called for the creation of the 30th Congressional District?

A. Well, there had been an outcry for the District for as long as there had been one from Houston. We had single member Districts for the Texas House, and it was virtually -- we were eventually instructed to get that District for -- at that particular decennial.

Q. Who instructed you?

A. There had been -- in the court decision, it had been suggested as well as from the Justice Department.

Q. You made mention that Dallas had been attempting to obtain a African-American District since 1971, or in the '70s, when the Houston District was created?

A. That's right.

Q. What type of problems was the Dallas African-American population encountering in terms of being

able to create that District?
A. It was split up, of course, to elect White Democrats.
Q. And how was it split and who were the serving White Democrats at that point in time that you could not get to create the District?

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A. Jim Mattox, John Bryant and Martin Frost. And the Trinity River was used as a boundary, which was right in the middle of the -- split the concentration of the African-American community in half.
Q. Jim Mattox, he served in what District? Is that District still in existence?
A. He served in the 5th.
Q. Bryant -- John Bryant served in what District?
A. He was also in the 5th. Mr. Mattox left because he thought it was time for the Hispanic -- for the African-American District, so he came out at that time. But after it didn't change, John Bryant ran.
Q. And then Martin Frost served in what District?
A. He served in the 24th.

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Q. I just have a couple of questions for you. Charles is going to put up the Hispanic voting-age population concentrations for the current plan and I wanted just to ask whether it's your opinion that the Hispanic population is divided across Congressional Districts now in the current plan?
A. To -- yes, to a certain degree.
Q. And what would you say is the motivation for that division?

A. I'll have to answer that the same way I answered to my attorney. It's to accommodate others.
Q. And, in particular, White Democrats?
A. Martin Frost.

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Q. I'm looking at a article that came out on November 9th of this year and it purports to quote you, and I just wanted to see if it's an accurate quote.
A. Okay.
Q. "We respect each other. But when it comes to redistricting, he's always worried about one person and

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that's himself, and he doesn't care what happens to anybody else." Is that an accurate quote?
A. Yes, it is.
Q. Who was that about?
A. Martin Frost.
Q. What were you trying to convey?
A. Just what it said.
Q. It also goes on to say that you felt double-crossed. Did you --
A. I was double-crossed, in 1996.
Q. Can you please explain?
A. Sure. There was -- at the time that the Districts were contested, I was the one with standing in the Dallas area, and it was Gene Green and Sheila Jackson Lee in the Houston area. And we were instructed by the Court to offer maps. We worked for a long time trying to get agreement with the maps between the Democrats and Republicans. So, finally, we had to submit separate maps. When we met with the State Attorney

General's office prior to going to court, Martin Frost presented the map that ultimately was adopted, and I told him, no, that wouldn't do. For one thing, it had the home and the office of Congressman Dick Army in it and the home and the office of Congressman John Bryant -- the home, not his office, I think. And, so as far as I knew, that map

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was dead.
But the attorney that was representing me was pregnant -- about eight and a half months pregnant by the time it was court time. So, Mr. Hebert, who is sitting right there, and Mr. Frost came to me to get him to represent me, to keep her from traveling, and I agreed to it, but I didn't know I would be double-crossed.
The next day after the map was turned in, it was not my map. It was the Martin Frost map, with those precincts removed that I just talked about and that's all. And that's the one I ran in from '96 up until the new decennial here in the last election.

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December 18, 2003, 8:30 a.m. Session

Page 73 [Bob Davis]

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Q. Were you involved in drawing redistricting plans for the Legislative Redistricting Board in 2001 for the Texas Senate and the Texas House?
A. Well, I was involved in drawing plans for a member of the Legislative Redistricting Board, some of which were subsequently presented to the board and adopted by it.
Q. Tell us your role in the year 2003 insofar as it relates to Congressional redistricting in Texas.

25 A. My recollection, it was sometime in late June

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1 of 2003 the Lieutenant Governor called me. He indicated
2 that the Governor was going to call a special session to
3 deal with the issue of Congressional redistricting and
4 would I be willing to come and assist the Senate in the
5 process. And I told him that I would.
6 Q. And did you draw plans for the Texas
7 Legislature to consider for Congressional redistricting
8 in the year 2003?
9 A. Well, you never draw a plan all by yourself.
10 But yes, I drew plans for consideration by the
11 Legislature or certain members of the Legislature in the
12 special sessions in 2003.

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15 Q. All right. Let's move now to Webb County.
16 We have on the screen, Mr. Davis, the Webb
17 County portion of the Legislative Plan. And in a
18 greenish color we see Webb County in District 28, and in
19 an aqua blue we see District 23.
20 And first off, would you tell me where the
21 highway, IH-35, is on that map?
22 A. Well, you can put it up there, I think with an
23 annotation. But this right here, I believe, is
24 Interstate Highway 35.
25 Q. Okay. I made the point during one of the

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cross-examinations that the split, the actual line of demarkation between Districts 28 and 23 was the highway. And then another witness made the point, though, that it's not entirely the highway. There's a portion there, that blue portion, that goes into Webb that doesn't follow the highway line. Do you see that?

A. Yes, sir, I see that.

Q. Can you explain why that is the way that it is?

A. Well, I don't know that I was actually involved in drawing this particular portion of the map. But I think that this area in here ended up being where you balance the population in District 28. The northern end of District 28 was fairly well configured in the Bexar County and in Comal and Guadalupe and Hays County, I believe, and so I think the balancing for population purposes in District 28 actually occurred in Webb County.

Q. Let's explain that answer a little bit more just in general.

Explain to us, when you have to have equal population size for all of the 32 Districts, how a demographer like yourself goes about zeroing out the population. How do you do that?

A. Well, first, of course, you identify what population you're zeroing to. I think in this instance it was 651,219 or 519, anyway, for 20 of the Districts,

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and 12 of the Districts had one additional person or, you know, 20 instead of the 19.

You got to start at the corners because you can't go get additional people anywhere else. So, I think the first District that got zeroed out, indeed I

think the District that probably never changed the whole process was El Paso County, and it was left the way it was, even though I saw some configuration change to put some cities back together. I think it was left the way it was.

And then you have to start in the Panhandle and then you have to start in South Texas, and then you have to start in East Texas, and you have to start in Southeast Texas, and then you bring all those and then you ultimately balance all the population towards the center of the State. And then when you get through, you balance all the Districts that touch in there.

So, in this instance, District 27, which is on the Gulf Coast from Corpus Christi to Brownsville, would have been balanced first. Because if you can confine it to those counties, then you had to balance it to the west. You couldn't -- you can't go east or south in those particular -- in that configuration because there's nothing but the Gulf of Mexico and the Nation of Mexico to the south.

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So you balanced 27 against 15, and then you balanced 15 against 25, and then you balanced 28 against 23. And then you balance 25 in the end in Travis County, which was its northern terminal.

And so the process is, is that once you have the territory configured, you go into some county, because you must do that, and then take whatever population is necessary in order to bring it up to or down to the ideal number.

Q. Is it your testimony that in order to equalize population amongst 32 ideal District sizes that it was necessary to cut county lines from time to time?

A. Oh, yes, sir. Absolutely. I do not know of any configuration that existed in any of this map structure where you put whole counties together and got the precise number of people.

Q. Did you ever have to cut voter tabulation Districts, otherwise called VTDs, from time to time in order to equalize population?

A. Yes, sir. In most every cut on the final analysis for equalizing the population, we were doing the final balancing, you had to cut VTDs. I think once in all of the drawing that I did, it ended up that there was a VTD, there were exactly the right amount of people on the border of the two districts involved.

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Q. When you're trying to zero out for population, whether it be Webb County or any other county in the State of Texas, what kind of census geography are you looking at, what level?

A. Well, my son -- who worked with me -- and I would argue about this, but I would generally start, as we almost did at the VTD level, and you would look for combinations of VTDs that approximated the population differential that you had to the ideal. Either take those out or put them in. And once you got to that level and got as close as you could, then you might go to the bloc group level, and I would go to that. He never would. But anyway, I would go to the bloc group level. If I found something then, I would move it. If I didn't, I would go to the bloc level, which was the lowest level of census geography that we have, and that's where almost exclusively the final balancing, sometimes you're looking for 1, 2, 3, 5, 10, 12, whatever number of people it might be, and that's where your final balancing would occur.

Q. All right. Let's shift gears and go to Hidalgo County.
Mr. Davis, we now have the Hidalgo County portion of Plan 1374C on the screen, and we're looking at Districts 15 and 25, are we not?
A. Yes. And some of 27.

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Q. Right.
A. But in Hidalgo County, you're looking at 15 and 25.
Q. All right. Now, I want to understand whether or not you received any instructions to keep the City of Mission whole?
A. Yes. Senator Hinojosa, who was on the conference committee, was interested in keeping the City of Mission whole and intact in whatever plan was passed. And we had a 722 plan that did that and an A3 plan that did not, and I think this A3 plan ultimately does. But he was interested in altering whatever plan was passed in order to keep the City of Mission whole.
Q. What about Edinburg and McAllen?
A. I think likewise, Edinburg, and I think it was kept whole. I do not know about McAllen, and I do not know about Pharr. They -- once again, the population balance for District 15 was effected in Hidalgo County. And there was population right at the last that was taken out. Aransas County that had been placed into District 15 was replaced and put back into District 14 historically where it had been. And then additional population out of Hidalgo County was taken and put into District 15.
At that time, and this was right at the time

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end of the process, it may well be that some city limit lines were cut down there. But the cuts in Hidalgo County were designed, at that point, just to balance the population.

Q. All right. Let's --

A. I think the number was something like 22,000 people, additional people out of Hidalgo County that went into District 15.

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Q. Are there instances where you went to the bloc level?

A. Yes, sir, I believe that there are. My recollection is that in Tarrant County, in putting Representative Lewis' Legislative District, District 95 together, which is predominantly African-American, we went to a bloc level after we put it all together to make sure that we hadn't left out any adjacent territory. Because you can flash up a VTD, and it might show that it's all Anglo. But if you went to the bloc level, you might discover that several blocs out of that VTD are African-American or some other ethnic that are attached to the VTD that's adjacent to that.

Q. Was the purpose there to keep the House District whole?

A. Keep the House District whole and make sure that in the process of doing that we didn't split a minority community.

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Q. All right.

A. I don't think that was -- turned out to be an issue, but that is one where we did look at it.

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Q. Okay. There's been suggestions made in Court

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that why not just leave 23 the way it is and let's move Henry up into the Hill Country. Why didn't you do that?

A. Well, I mean, that would have given away a seat that a Republican currently holds rather than enhancing the seat. Which was one of the principal objectives in this redistricting process, was to enhance District 23 and Congressman Bonilla's stature. And, of course, you know, I have some personal feelings with respect to that, is that I believe that Congressman Bonilla's participation in the election in these principally Hispanic counties in South Texas has a beneficial impact long term. I think if you look at the election returns they certainly would indicate that he runs better than other Republicans do in that area.

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December 18, 2003, 1:00 p.m. Session

Page 6 [Bob Davis]

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Q. You told the Court this morning that one of the objectives you were instructed to accomplish was to increase the number of Republicans elected to Congress. Do you recall that?

A. Yes, sir.

Q. Another one of your objectives was to make District 23 more Republican so it will be safer for

Congressman Bonilla, correct?
A. That's correct.

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Q. Just tell us. I'm curious. Using this computer system, if you want to go after Democrats and do something with them, either include them or exclude them, how do you -- how do you identify that a particular voter is a Democrat?

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A. Well, one of the ways that I did it when I was doing this was to look at other Districts that overlay that census geography and see how it voted. For example, in District 25, when you brought it up and brought 15 up and you needed additional population and you wanted to put in Democrats into District 25, I knew that Travis County elected three Republicans to the Texas House of Representatives and three Democrats to the Texas House of Representatives and that the Democrats lay to the main on the east side of the county and the Republicans lay to the main on the west side of the county. So, when I needed additional people and I wanted Democrats to put in a District that was, you know, there, I simply went to Travis County and started taking people on the east side.

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Q. Well, Mr. Davis, insofar as the Districts you drew, not the ones you got from someone else, how could you make sure that those Districts complied with the law unless

you paid attention to the race of the people in those Districts?

A. Well, Mr. Susman, the one District that I can think of that I drew that would have been -- maybe two, that would have fallen in that category would have been District 25, when the population from The Valley was brought north, and looking at -- and let me say that the -- again, the genesis for that was certainly not mine, that plan had been proposed before. I think LULAC had proposed

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that to the three-judge panel that heard the case in 2001. The difference was when LULAC got to the northern terminus, they turned east and went towards Houston to get additional population. We turned west and went towards Travis County to get additional population. You put that population in and then you check the numbers at the end to see what it looks like.

Now, we took most all of the legislative District that is -- that commences at the southeast corner of Travis County. In fact, I think we took all of it except for a section that's east of 35, just north of the Colorado River, and I believe all of that legislative District is in the current District 25. And then we went north along the east side and across the north side and filled up till you got the right population. And when you get through at the end, you check your numbers and see what you have.

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Page 65 [Ron Wilson]

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Q. Good afternoon. Please state your name.

A. Ron Wilson.

Q. Mr. Wilson, where do you live?

A. I live in Houston, Texas.
Q. What do you do for a living?
A. I am an attorney by profession.
Q. What type of law do you practice?
A. A little civil-criminal, but primarily entertainment.
Q. Where did you go to law school?
A. The University of Texas.
Q. Where did you go to undergrad?
A. The University of Texas.
Q. Where did you grow up?
A. Houston.
Q. Are you in the Legislature?
A. I am.

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Q. Let me ask you straight out. There have been some suggestions, some intimations that your support for Plan 1374 was because you wanted a District that you could run in for Congress. Is that true or is it false?
A. It's absolutely false. Anybody who's watched my record over the past 20 years regarding redistricting can tell you that I have always been in favor of, where the numbers justified it, the creation of seats that would elect African-Americans and Hispanics in the positions of electoral responsibility. I think that I would be discounting and turning my back on 80 years of civil rights history to do otherwise.
Q. Speaking about that, what is the importance in

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your view of Martin Luther King and the civil rights movement, and how does that apply, if at all, to what

we're talking about right now?
A. Dr. King, his struggle definitely impacts on, at least what I do, as did the works of Dr. Carmichael and Ron Corran, and all the others that helped out in the movement. I mean, they fought for a place at the table, you know, not a ticket in a gallery.
And to me, when you talk about influence District or impact Districts, I call them begging and pleading Districts or step 'n fetch it Districts. Those are -- that term, I think, was originated by the segregationists when they tried to stop us from going to single member Districts. They said, oh, no, you have great influence as -- as your votes are in a county-wide race. Because you make up 15 to 20 percent of the county, you can influence all these folks. I mean, that was their argument against going to single member Districts, and now the same thing has cropped up now in this debate.
Q. I have heard both testimony and argument from one side of the room in this case suggesting that District 24 up in Dallas is a District that would elect a Black for Congress if pitted against an Anglo. What's your thought about that?
A. I think it would elect a Black if it was Martin

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Frost's long lost, you know, Black child, but -- standing up there with Strom Thurmond's daughter. There's no way. There's absolutely no way it can happen.

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Q. Last question. As I just sort of like you to break the code. A lot of people are saying, you know, Plan 1374C -- and for the record, you voted in support of

that?
A. I did.
Q. It's a Republican dominated map. It's what's -- it's what the Anglos want. It's what the Republicans want. It's unfair to minorities. Nobody supports it, and then all of a sudden they can't quite explain why Ron Wilson supports it. You're an African-American Democrat, and I just want to ask you flat out, why, sir, did you support this plan?
A. Well, the truth of the matter is you got Anglos fighting back and forth over this thing. Those are the ones who are fighting. I mean, my folks are kind of in the middle. And my deal is the train's on the track. I mean, in the Legislature right now we have a majority of

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Republican Legislatures. Majority House, majority Senate.

I have been around long enough to know that in a democracy, majority rules. Duh. So, if you got the votes, you get to rock and roll. And that's exactly what's happening.

The question for me is, do I sit on the sideline as the train goes by, you know, or stay on the track and get run over, or do I try to get some of my folks on the train. It's my opinion that in the spirit of the civil rights movement I should try and advance the interests of those who I represent. And if I can get another seat or support another seat for African-Americans and Hispanics out of this process, so be it. That's why I supported the plan.

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Q. Okay. Now, you said a minute ago, Mr. Wilson, if I understood you correctly, that these minority influence

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Districts, what I'm calling minority influence Districts, Sandlin, Turner, et cetera, in East Texas, you regard as begging and pleading or step 'n fetch it Districts; is that right, sir?

A. Those were my exact words.

Q. Okay. And you say that not withstanding the voting record of the Democrat incumbents in those Districts since they've been in Congress?

A. I say that as an absolute statement, yes.

Q. And you mean by that not that Mr. Turner and Mr. Sandlin and those other Democrats, those other Anglo Democrats are going and soliciting or begging votes from the African-American community, what you mean is that the African-American community is going and begging things from them?

A. It's a -- begging and pleading and step 'n fetch are terms, I guess, that came out of the Thirties in the African-American community. They are very derogatory positions that African-Americans had to take to get things done. I use those terms to describe the relationship between the African-Americans in those -- in those Districts, especially those East Texas Districts because that is the relationship the way I term it between the African-Americans and those members that hold those seats.

Q. The way you term it, the African-Americans who

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are in those communities of interest in those Districts have to go with their hat in their hands to these white Anglo Congressman to get them to support their bills or their issues. Is that what you're saying?

A. They got to beg and plead. They got to say, you know, we've got problems in our community with HIV, we got problems in our community with education, can you please help us with this? And that's one of the reasons that -- that we get so much -- so many calls from their areas for help because they can't get it out of their own folks.

Q. Can you tell me anytime that an African-American constituent has approached one of the seven Anglo Democrats in question and gone begging, as you put it?

A. No. I can tell you some of them -- some of the African-Americans that live in their Districts call me all the time across the State for help on Federal matters because they can't get any help out of their Congress persons.

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Q. Mr. Wilson, you talk about the -- how the train is on the tracks and there's a steam roller coming down the tracks and that what you have to do is to do your best to protect the African-American voters that you represent and that the Republicans have the numbers and the thing to do now is to do something like you tried to get done here, which is to get a new African-American majority opportunity District. Is that a fair summary?

A. I've tried do this when there was Democratic leadership in both houses and in the Governor's Office, and they wouldn't do it. There's enough African-American

population in Houston to justify having a second Senate seat, but the Democrats didn't do it.

So if I have the opportunity -- I offered a plan to do that when Democrats were in control and I offered the same plan when Republicans were in control. It doesn't matter who's in control. I'm trying to advance the interests of my community, period.

* * * *

Page 135 [Phil King]

* * * *

Q. (By Mr. Taylor) Let's go to, sort of the political deal making, if you will, that you're aware of that went into how Tarrant and Dallas counties were configured in Plan 1374. Of your own personal information, what was going on there politically?

A. Well, there were a lot of things involved in Tarrant County. Can I use this laser?

Q. Sure.

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A. If -- the way I would approach the map is I would always look at the existing map and then I would try to look at each District and say okay, how do we make this District more Republican. And you do that in two ways. One, bring up more Republicans into the District, or you -- if you can't get the numbers up high for Republican, then you try to break up the District and break up the benefit of incumbency for the -- from the incumbent. But at the same time we didn't want to lose any seats in doing this. For example, in District 12, Kay Granger we had become aware through the process that it was probably better for her not to move into northeast Tarrant County. At one time we considered doing that, but when she was Mayor of Ft. Worth they had sued the city of Grapevine

over an issue with D/FW Airport. There were concerns there might still be issues. Plus, if all of a sudden we dumped a whole bunch of Republicans, because they're thick out here, into Kay's District, she probably would have got a Primary opponent, and we were trying to avoid that thing.

Kent Grusendorf, you know, my job was to get eight votes aye on the redistricting committee then 76 on the Floor and then six in the conference committee. And Kent Grusendorf had said that he -- that he would not support any plan -- he was on the redistricting committee -- that did not keep the City of Arlington whole. He said

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Arlington always gets split up. He wanted it whole. We were all committed, and all made an informal pact -- I say we all, a number of us, that we wanted to make sure we tried to provide a District that Kenny Marchant could run and Kenny Marchant would win in. And that meant bringing up his area around Coppell and all of that into a District.

I had also been directed by the Speaker of the House -- Glenn Lewis, was the first Democrat and the first minority member to come out supporting him publicly for Speaker. And Glenn Lewis had asked the Speaker that his District not be divided up, but remain intact within a Congressional District, nonspecific as to which District, although he made it clear his preference was that it stay in a Martin Frost District.

So I was directed by the Speaker of the House to under no circumstances split up Glenn Lewis' House seat, which is 95.

Well, that also means that you're narrowed down in how you do that. So ultimately -- and then I wanted to bring Kay Granger's District, she currently

represented Parker County. Wise County was being represented in West Texas, but their economics and transportation and everything in growth is coming out of Denton and Tarrant, so I wanted to bring them into Kay

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Granger's District.
So, for example -- so what we did in Tarrant County, the only way we could do that is basically took Stop Six Poly and Handley and Meadowbrook area and all of that and moved it up into north and tied it in with the Denton County area. And those -- we tried to, the best we could, maintain the city limit lines for Ft. Worth and for Arlington in that measure. And generally, you had that level of politics going on in every county, particularly the metropolitan ones throughout the State.
Even where you didn't have -- and that was the interesting thing. People kept talking about the public testimony. But the members did a great job. I mean, we're a Republic. We're representatives. And the members did a great job of making sure that we knew exactly what they expected for their Districts, even if they said I can't vote on this, but it would be better if you did this. And there was tremendous input and political considerations drove the day throughout the State.
Q. The fact that you were from Parker and Wise County in terms of your House District representation, did that not influence the drawing of the map at all?
A. Oh, absolutely. If -- you know, I had to get -- that's about 48,000 people there and about 90, 89,000

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right there, well, that means I can only have 500,000 left in Tarrant County. So that moved Kay's District -- Kay Granger's District to the west, and you've got to make up for that on the east.

Q. Tell us if you had any conversations with Representative Luna about what she wanted and how did that work its way out --

A. Sure.

Q. -- in the map?

A. Vilma Luna was on the redistricting committee. I very much wanted her vote. She did vote for the map at the committee level. Her primary concern was she wanted Nueces and San Patricio to stay together, to stay intact. We tried that all the way through. The reason she wanted that is because that would allow the Corpus Christi area to have a greater opportunity to continuing to elect a member out of that District. In fact, that was a running battle between her and Kino Flores. He wanted the population more at the bottom so his area would have a greater chance in that.

Ultimately -- and we were able to hold that together for her all the way until we got to the conference committee. Finally, when I realized we were not going to be able to do it, the Senate had some other ideas for San Pat., I went and sat down with Vilma a

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couple of days before we drew the final bill, and we sat down and I said, what areas do you absolutely have to have in San Pat.? And we drew those out, which were the port areas, the cities Inglewood and those, and drew it and tried to satisfy her as best we could.

Q. The allegation has been made that the way the map was drawn was to try to hurt minorities. What's your take on that based on everything you did and that you know and observed?

A. Well, absolutely not. I mean, frankly, we did everything we could to try to make sure that we had a map that would pass legal muster. I mean, the last thing we wanted to do was to go through all this grief and all this work and three special sessions and now lawsuits and everything is and then have a map that failed DOJ. Everything was focused on trying to get through DOJ.

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Q. (By Mr. Smith) Now, let me ask you about the new District 25 in South Texas. Is there any doubt in your mind that the reason that that District was created was to add an additional Hispanic District between the border and Travis County?

A. Well, no. That was the purpose. But the -- the concern was that District 23, because we had put more Republicans in there, might not be a -- considered a Hispanic District. And so the advice was that we should create an additional District.

There were other reasons for doing that, as well. Frankly, the population growths in that area. I mean, if you just beamed in from outer space, you would probably take and draw a Hispanic seat right down at -- right down at the base of Texas because the population demands it. But the problem is, the way the Voting Rights Act is it makes it very, very difficult to do what common sense would otherwise dictate, and that's draw a seat where it should be. And really the only way we could do it was to do that, what some people call a slot map, a slot District.

Q. And the reason why that was the only way to do it was because you were leaving 350,000 Hispanics in District 23, Mr. Bonilla's District; is that right?

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A. Well, no. The only reason you could do it -- the only reason you had to do it that way is because under the Voting Rights Act, any other way we tried to do it, we kept being told that it would cause retrogression in the adjoining Districts. The only way to avoid that was to do it in that long, narrow District.

Q. In order to avoid retrogression, you needed the Hispanics in Travis County to up the numbers; is that right?

A. Well, I think you had to go up there to pick up the Hispanics, yes.

Q. Okay. Now, you certainly wouldn't --

A. But that was also -- see, that makes it sound simpler than it was. There was also the ongoing effort to figure out how we do District 10 into a District that a Republican can get elected. Well, to do that you've got to move Democrats out of District 10, and one way to do that was to put them in District 25.

Q. So it kind of did both of those purposes at the same time?

A. Yeah, absolutely. I mean, our objective was always how do we get more Republican seats and stay away from Districts that would create issues for DOJ.

* * * *

December 19, 2003, 8:00 a.m. Session

Page 7 [Todd Giberson]

* * * *

Q. And what do you do for a living?

A. I am a redistricting analyst and a geographer -- geographic information systems programmer for the Attorney General's office.
Q. When did you start there?
A. In 1994.
Q. What is your educational background?
A. I am a geographer -- geography major, computer science minor from Texas State University.
Q. After college, where did you work?
A. I first went to work for the Texas Legislative Council in their redistricting division there.
Q. What did you do when you worked for the Texas Legislative Council?
A. Primarily, at first, I was the lead programmer in the development of the original RedAppl system in the 1990s.

Page 8

Q. So are you to blame for this? The RedAppl program is something you did?
A. I had a hand in it, yes.
Q. After being part of that effort, what else did you do with the Texas Legislative Council?
A. I also did other sorts of reports. I began some analysis following the Shaw ruling in '93 while I was still there, to -- in order to look for ways to evaluate Districts in light of that ruling.
Q. Give us some examples.
A. Well, for example, the development of compactness measures. I was called back to the Legislative Council to program the compactness measures that are in the current RedAppl system in the new -- because of my working with compactness measures and have been immersed with -- in

17 redistricting plans for many -- over 10 years.

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Page 18

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16 Q. Okay. Let's now turn to the next set of
17 exhibits in this document and let's talk specifically about
18 Districts 15, 25 and 28, and then we'll talk about your
19 demonstration map.
20 Tell us, based on your experience, whether
21 or not Districts 15, 25 and 28 in Plan 1374 have any
22 kind of compactness measures or other peculiarities
23 which you would deem significant in a Shaw V. Reno
24 sense?
25 A. Well, the only thing that might be significant

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1 would be that small circle compactness for 15 and
2 25. But again, it's -- when you consider the way
3 that Districts are constructed in Texas, in West
4 Texas, in South Texas, particularly Hispanic
5 Districts coming out of The Valley, it is common
6 practice to begin a District in The Valley and bring
7 it northward.
8 It's commonly done by anyone drawing --
9 anyone attempting to draw Hispanic Districts will
10 come up north in elongated fashion. These tend to
11 stick a lot with whole counties.

* * * *

24 Q. Now, let's turn to your demonstration plan for
25 the northern border of District 25 in Travis

Page 20

1 County. What were you trying to demonstrate?

A. Well, I thought it -- it might be -- I looked at the -- compared the cut into Travis County overlaid on top of the Hispanic percentages, and I wanted to see how closely they are trying to excise Hispanics from Travis County to include into this District.
And when I looked, there was not really that great of a correlation in the District as it was drawn in 1374. And so I went and did a demonstration plan where I went in and brought in blocs that had high Hispanic densities and then took out some of the other nearby blocs that did not have those high densities to see what a District would really look like if someone was really solely concentrating on race or ethnicity to draw the District boundary. And so that's what this demonstration plan shows.

Q. All right. The fact that the demonstration plan is different than the actual Travis County portion of District 25 in Plan 1374C, of what relevance or importance is that to you?

A. Well, it all goes back to demonstrating whether there was an -- to any extreme degree, was there an attempt to separate one race or ethnicity from another.

Q. To ask it in a more global fashion, if the

question for the Court is whether or not race is the predominating factor in the configuration of the lines of the Districts in the Legislative Plan of 2003 that they're reviewing, what is your opinion in that regard based on your analysis?

A. I would -- I say no, that race is not predominated over other factors in the drawing of the lines.

Q. Let's turn to the next part of your exhibit, and that's the sort of spreadsheet that says, Analysis of VTDs at District Boundary. Please explain that document for the benefit of the Panel.

A. Well, this is more just a helpful tool to look at. And I utilized this in evaluating the demonstration plan that I had drawn in Travis County compared to 1374 as drawn in Travis County, to provide some kind of empirical evidence of what's happening at the border and how finely tuned the cut is to bring the Hispanics into District 25.

Q. And what did you find?

A. I found that -- and so -- let me explain basically the methodology. I took any VTD that was along crossing the border or adjacent to the border of District 25 in Travis County and then the ethnic breakdown along with some other statistics were generated for the portions of those VTDs down to the bloc level that were just inside

the boundary and compared that to those just outside the boundary and noted that in -- the top -- top section here, in the demonstration District, if I looked at something like Hispanic VAP on the inside, it was 47.99 percent Hispanic VAP, that inside section.

Q. And there's sort of some shading over that figure in your report?

A. Yes. It's hard to make out on some of these copies.

Q. And the top, just so we're on the same page here, the top portions are statistics for the demonstration District 25?

A. Yes.

Q. All right.

A. Yes.

Q. Keep going.
A. So then compare that -- now, it has comparisons by the Districts that are adjacent. Then you see a total, the outside total at the bottom, 27.77. So if you go just on the demonstration plan now, if you go just inside the District to just outside the District here, you've got a drop there of over 25 percent in -- of Hispanic VAP. Then I ran the same exact report for the District 25 as it was in 1374.
And you'll see there, using again Hispanic

VAP, just inside the District, 37.9. Just outside the District, 24.19. A drop -- a drop of only around 13 and a half points. A much milder drop, again, not evidence that race is predominated in the separate -- in the drawing of that District.
Q. Why do you have, at the bottom of the page, the 1000C District 28 in Comal County statistics?
A. Well, I thought I might ought to provide some other real world District. This -- this one happens to have quite a high drop. Just inside 53.62 in Hispanic VAP. Just outside, 15.79, for a drop of some 37 or so percent. But I included it here because that cut into Comal has already been looked at, evaluated by the Courts, because it was part of that remedial plan 746, now 1000. Looked at and specifically identified by the Court and okayed by the Court as not being particularly egregious in comparison to the whole District.
Q. Let's quickly go through the remaining attachments to your original report. You have District 23 in the Court's plan. You have District 19 in the State Senate plan, which for purposes of the record is labeled as

1188C, and that's the LRB plan of two years ago, and you also, finally, have District 31 from the State Senate plan. Would you explain why these are in here and

Page 24

what it demonstrates in your opinion?

A. Let me make one correction, that 01188, where it says C, it should be S. These are actually Senate plans, and that's just a mistake.

Q. Thank you.

A. On my part.

The reason these are included is because another way to look at District 25, District 28 and District 15 that cover a long territory, and people have complained about the connection between Travis County and McAllen, for example, to show, in Texas anyone drawing Districts, especially in West Texas and down in South Texas, is going to be going, in this case, from District 23 from El Paso, over 500 miles, into San Antonio and down into Laredo. It covers a much longer distance than from the 300 miles from Travis to McAllen. And to give another example of the -- in the current State Senate Plan of District 19, which also goes from El Paso on the border of Texas on in to pick up Hispanic -- primarily Hispanic population in Bexar County, San Antonio area, again, over 500 miles. And then we look at the State Senate plan again, District 31, which goes from the Oklahoma border, reaches down through Amarillo, by-passes the metropolitan

Page 25

center of Lubbock by a single county-wide strip, and then

picks up the Odessa-Midland area, even going as far south as Crane County.

Q. Okay.

A. That's over 400 miles there it's traversed.

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Q. Mr. Giberson, Mr. Hirsch asked you on cross-examination a series of questions preparing smallest circumscribing circle scores of certain Districts in Plan 1374C with previous District configurations for Congress in the State of Texas. If he had instead asked you to compare

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perimeter-to-area scores of those same Districts, would your answers have changed?

A. Yes. They would have -- my answer would have been very different.

Q. And why would it have been different?

A. The perimeter scores are much worse in those previous plans -- say the 657 plan and those Districts that were gone over in perimeter score than the Districts in 1347.

Q. On cross-examination Mr. Hirsch also asked you a series of questions comparing smallest circumscribing circle scores of certain Districts in Plan 1374C with previous District configurations outside the State of Texas for Congress. If he had asked you to make that same comparison looking, though, at perimeter-to-area scores, would your answers have changed?

A. They would have been different, yes.

Q. And how would they have been different?

A. Well, the Florida District, Georgia District,

those are much worse in perimeter compactness than what we're looking at here in 1374.

Q. So if Plan 1374C does a better job on perimeter-to-area scores than they allege it does on smallest circumscribing circle scores, which factor, in your opinion, is more important?

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A. Well, certainly the perimeter score is a better measure of what -- a high perimeter score, for example, would be a better measure of what the Court doesn't like. Say using that as a measurement tool.

Q. So, if you're looking at perimeter-to-area on one hand and smallest circumscribing circle on the other, what is your expert opinion about how the Court should give weight to those two scores?

A. Well, I would hesitate to try to weigh those scores, but as a measuring tool, the perimeter score had more applicability, certainly in Texas and many of these other Districts, to the Districts that were struck down. The perimeter score is really what shows how convoluted, picked apart the boundaries are on race or ethnicity. And that's more of a better gauge, I would say, than smallest circle score.

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IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

JOINT APPENDIX
Volume II of II

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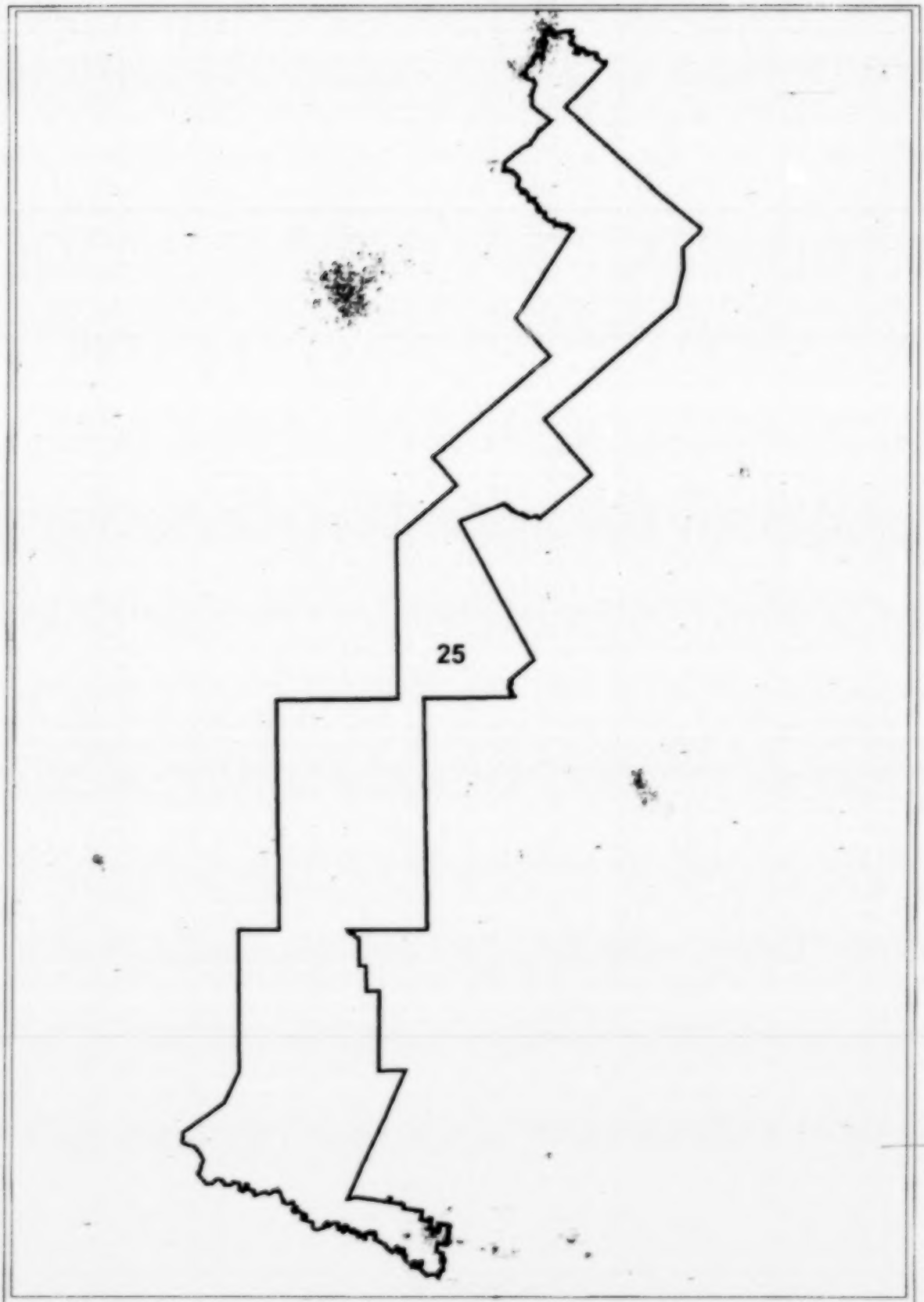
BEST AVAILABLE COPY

DISTRICT 25

U.S. Congressional Districts
HB3 as Enacted by the 78th Legislature 10-12-03
PLAN 01374C

Source: PLAN01374C



U.S. Congressional District 25
HB3 as Enacted by the 78th Legislature 10-12-2003
PLAN01374C
with Population Density per Square Mile
by Census Block Group

Comparison of minority opportunity districts of Plan 1151C to Plan1374C

Plan 1151C			Plan 1374C		
District	% Min pop/vap*	%SSR	District	%Min pop/vap	SSR**
			9	70.4/66.2	
10	44.4/39.2		10	28.2/25.7	
15	79.6/75.9	67	15	71.8/62.2	56.7
16	80.7/77.8	67.5	16	77.8/67.5	67.5
18	75.1/70.8		18	76.1/72.2	
20	73.8/69.9	61.5	20	74.1/70.3	59.9
23	68.2/64.6	55.3	23	56.9/47.9	44.0
24	60.2/54.6		24	28.0/24.9	
25	57.4/52.3		25	76.2/71.1	
27	71.6/69.7	61.6	27	70.7/66.8	58.0
28	77.3/73.6	59.6	28	70.766.6	54.3
29	77.1/72.6	42.5	29	76.0/71.3	45.9
30	72.1/67.7		30	76.1/71.4	

In these districts the minority community has an opportunity to elect candidates of their choice.

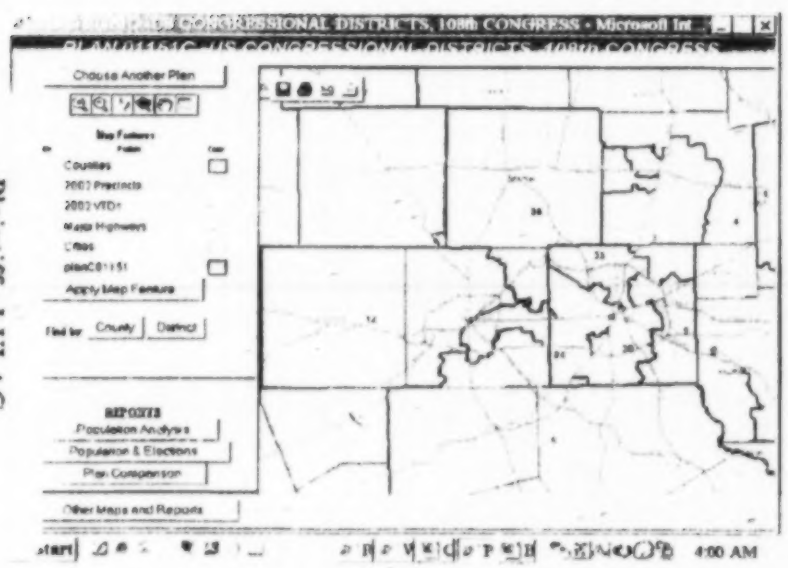
* min = minority; pop = population; vap = voting age population

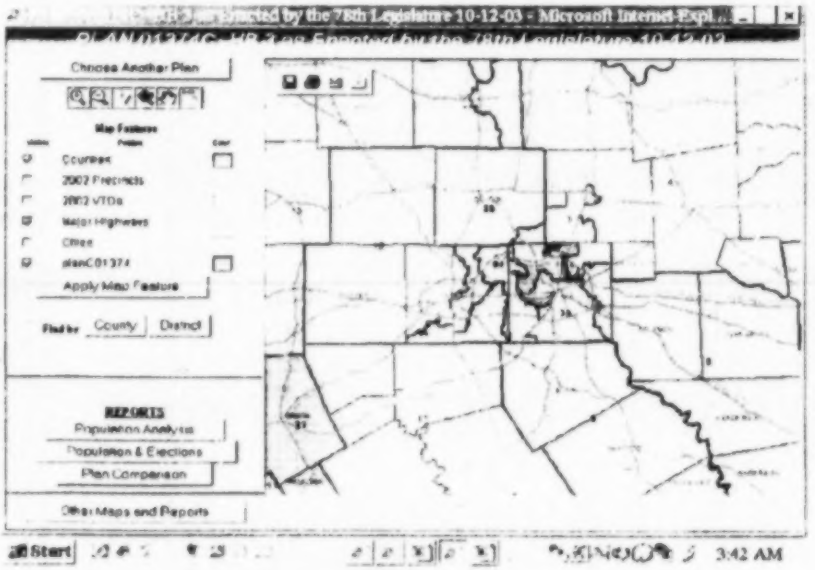
** Spanish Surnamed Registration

DISTRICTS 10, 15, 23, AND 24 ARE LOST AS MINORITY DISTRICTS

Analysis of Congressional Districts In the Dallas and Ta[illegible]t County Area Current Plan (1151C) Plan on Submission 74C)

		Total Population				Voting Age Pop			Reg. Voters		Turnout	
		Total	%B	%H	%B+H	%B	%H	%B+H	Total	%SSnam	Total	TO/VR
PLAN 1151C	3	651,620	7.1	14.4	21.3	6.4	12.9	19.1	335,445	5.9	157,498	47.0%
	5	651,620	16.4	17.7	33.9	14.9	15.3	30.1	306,961	7.2	141,716	46.2%
	6	651,620	10.8	13.5	24.1	9.7	11.7	21.3	343,374	7.3	167,892	48.90%
	12	651,619	4.9	19.9	24.6	4.6	17.1	21.6	324,442	9.5	158,099	48.7%
	24	651,619	22.7	38.0	60.2	21.4	33.6	54.6	251,553	18.0	114,181	45.40%
	30	651,620	41.4	31.1	72.1	40.3	27.7	67.7	278,429	11.4	120,357	43.20%
	32	651,620	8.3	36.2	44.3	7.8	31.4	39.0	268,513	13.3	140,186	52.20%
PLAN 1374C	3	651,619	9.9	16.9	26.6	9.1	15.3	24.3	314,404	6.3	146,510	46.6%
	6	651,619	13.5	15.9	29.2	12.3	13.9	26.0	326,828	7.1	160,092	49.0%
	12	651,619	6.1	23.7	29.6	5.7	20.4	26.0	311,607	11.3	151,407	48.6%
	24	651,620	10.3	17.9	28.0	9.3	15.8	24.9	305,770	8.8	148,013	48.4%
	26	651,619	16.1	14.3	30.2	15.0	12.5	27.4	339,722	5.8	161,292	47.5%
	30	651,620	42.3	34.2	76.1	41.0	30.7	71.4	275,776	12.5	119,705	43.4%
	32	651,619	9.7	27.4	36.9	9.1	24.1	33.0	278,740	8.3	148,621	53.3%





In 1151C, the minority community in Tarrant County was connected with a significant part of the Hispanic Community in neighboring Dallas County

In 1374C (on submission), the minority community in Tarrant County is divided among three districts (6, 12, and 26) and the Hispanic Community

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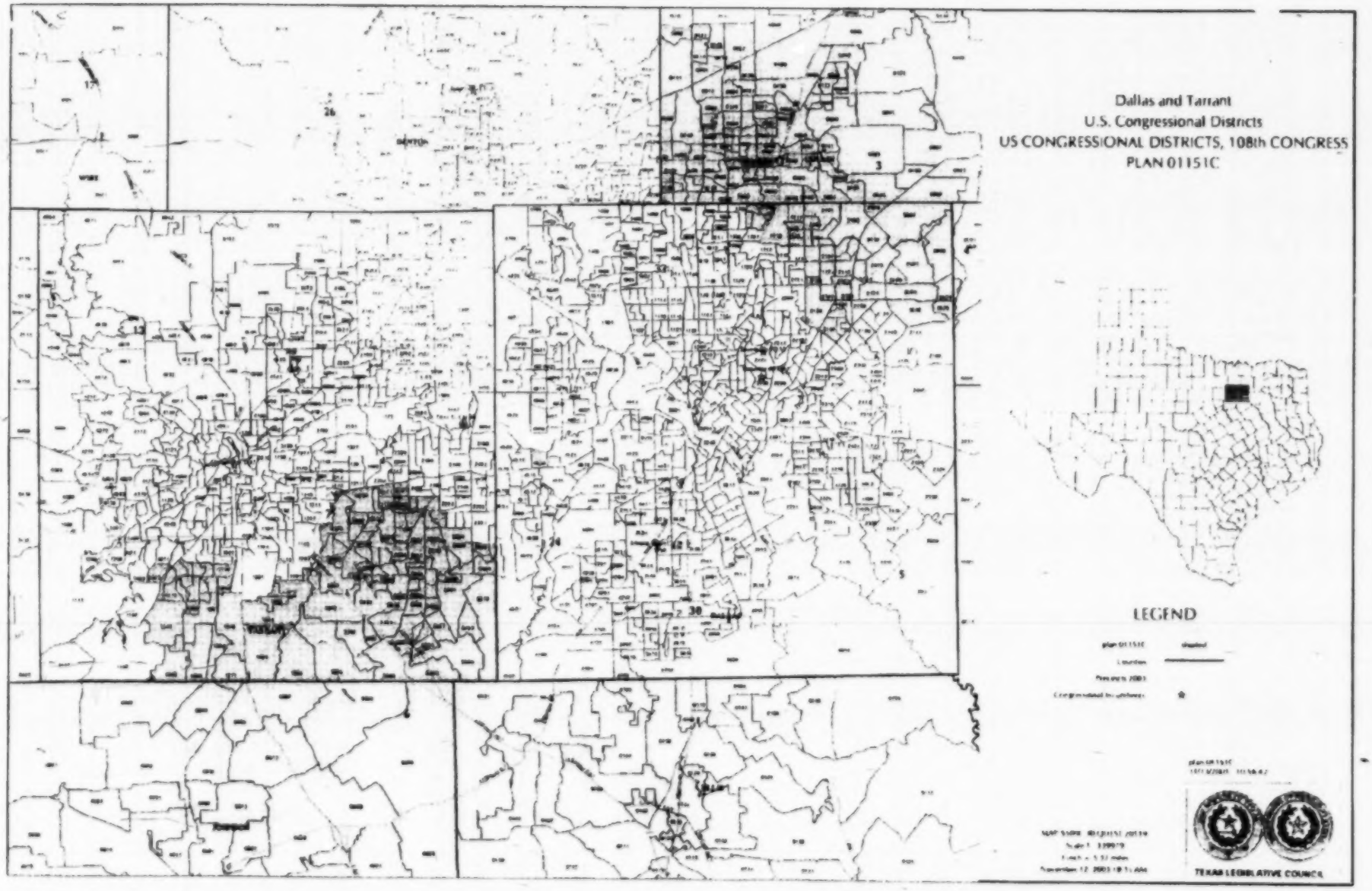
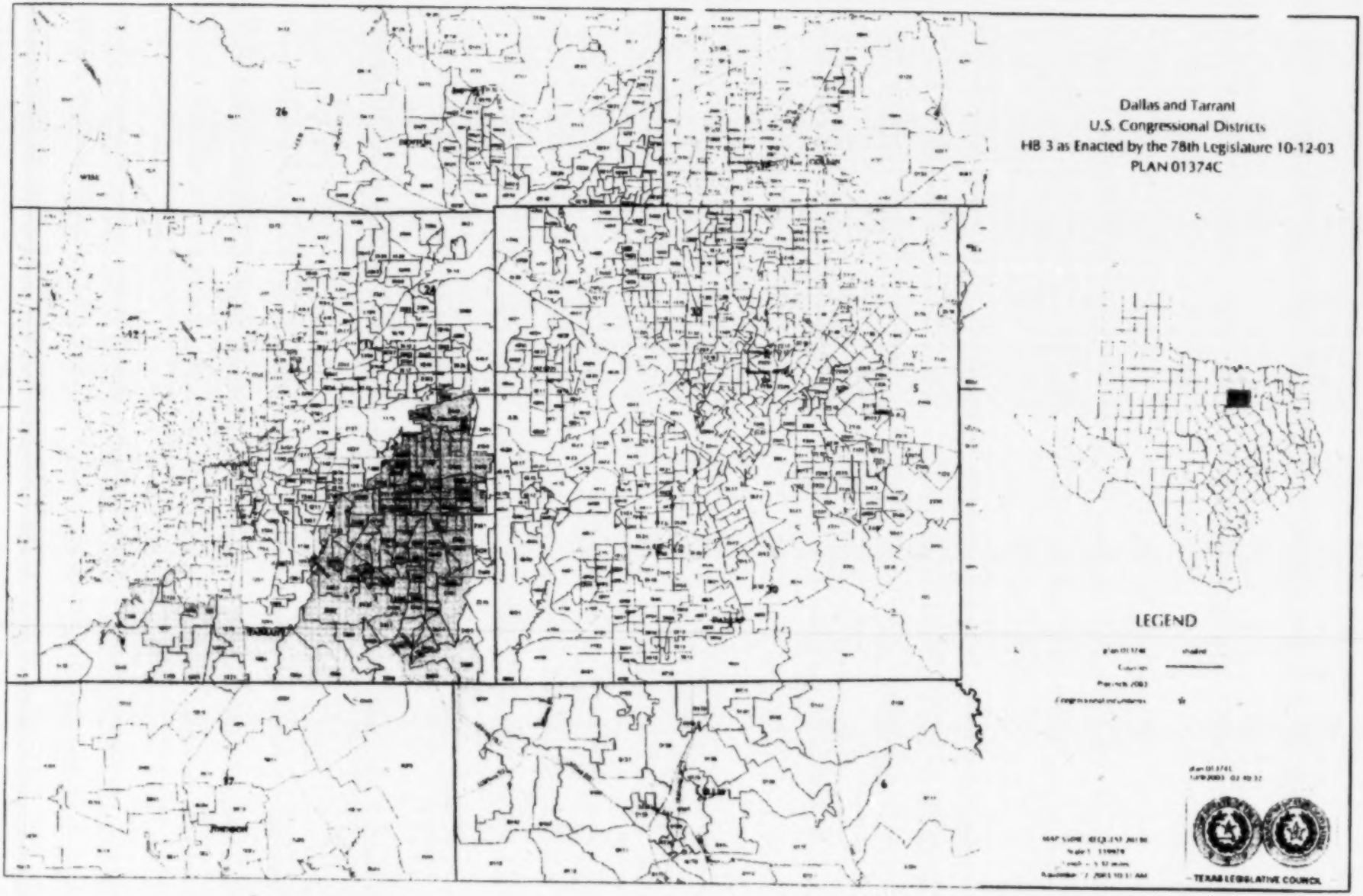
Exhibit No. 3

300


Dallas and Tarrant
U.S. Congressional Districts
US CONGRESSIONAL DISTRICTS, 108th CONGRESS
PLAN 01151C
LEGEND
TEXAS LEGISLATIVE COUNCIL


Dallas and Tarrant
U.S. Congressional Districts
HB 3 as Enacted by the 78th Legislature 10-12-03
PLAN 01374C
LEGEND
TEXAS LEGISLATIVE COUNCIL

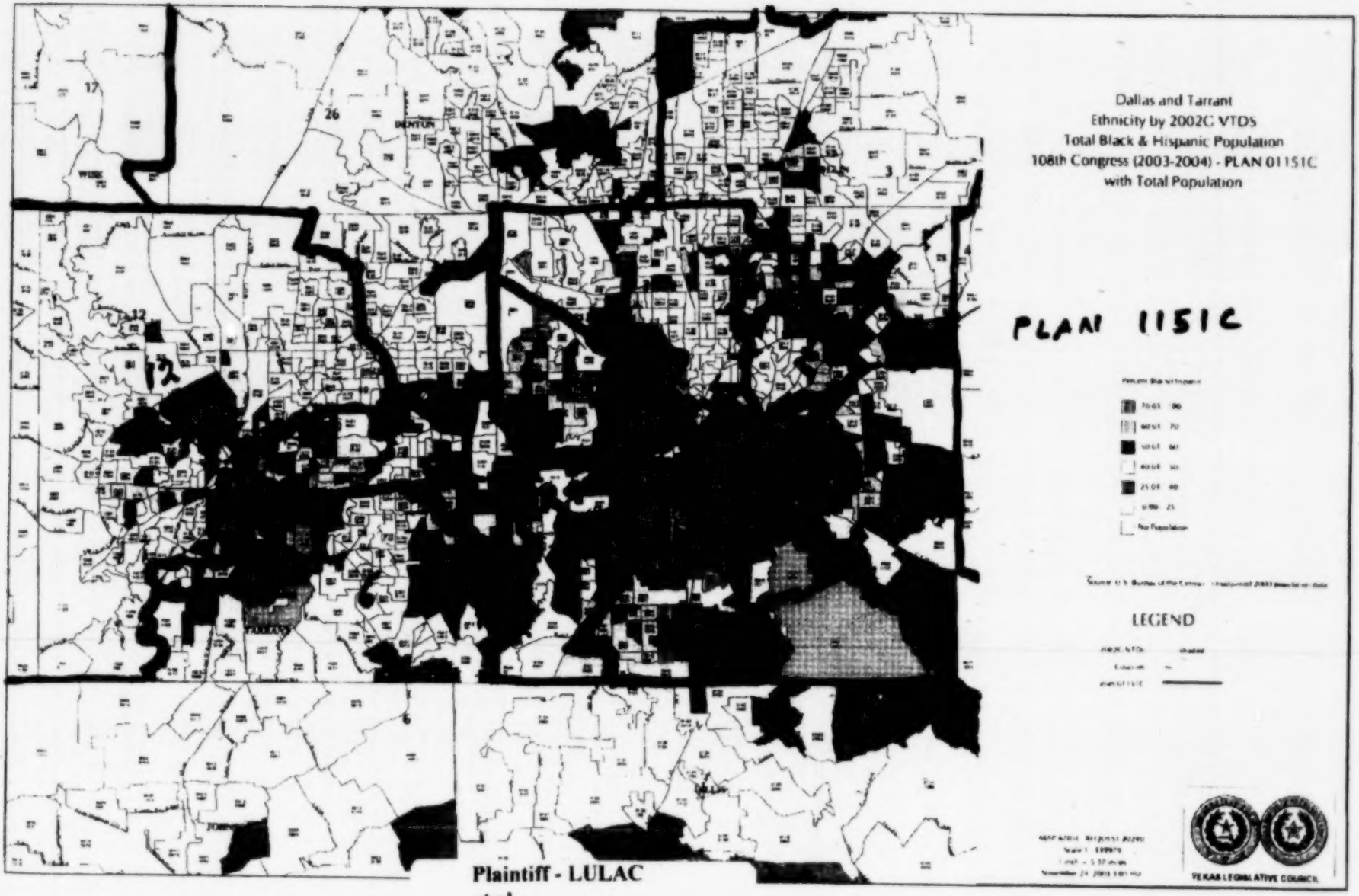


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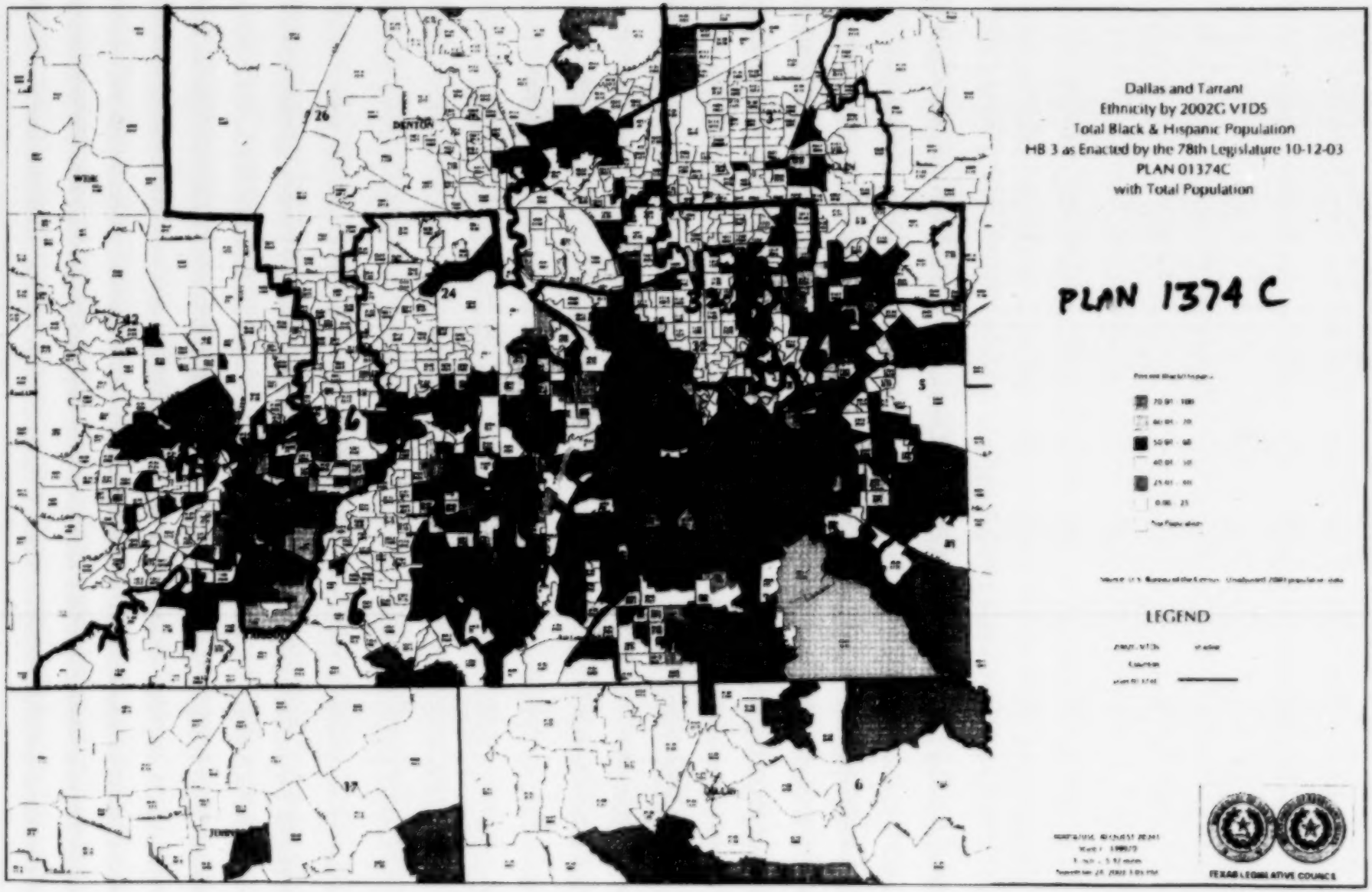
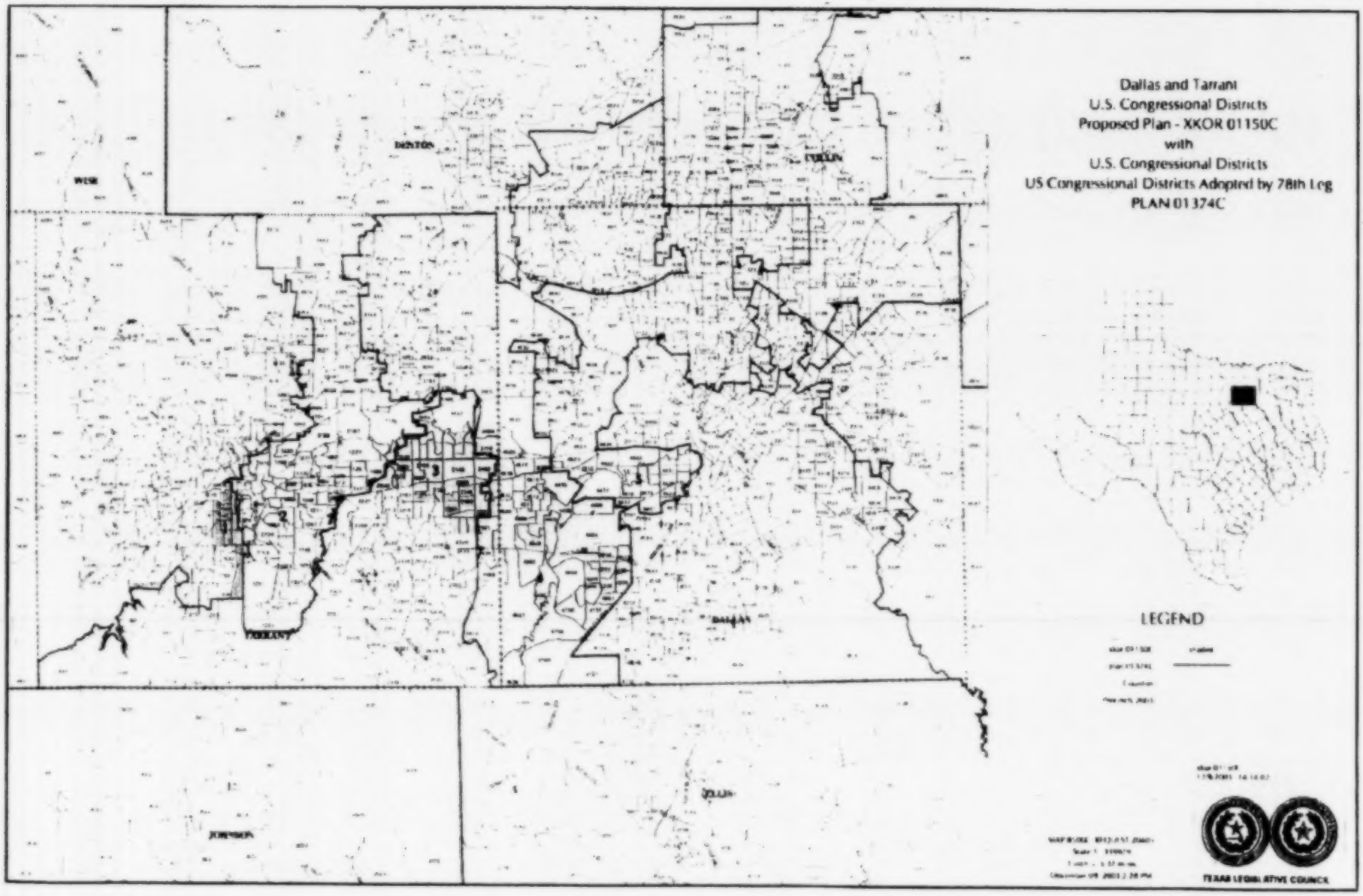
Exhibit No. 4


Dallas and Tarrant
Ethnicity by 2002C VTDS
Total Black & Hispanic Population
HB 3 as Enacted by the 78th Legislature 10-12-03
PLAN 01374C
with Total Population
PLAN 1374 C
LEGEND
TEXAS LEGISLATIVE COUNCIL


Dallas and Tarrant
U.S. Congressional Districts
Proposed Plan - XKOR 01150C
with
U.S. Congressional Districts
US Congressional Districts Adopted by 78th Leg
PLAN 01374C
LEGEND
TEXAS LEGISLATIVE COUNCIL

District 23 Study--A Recreation of Elections Involving Hispanic and Anglo Candidates in the Current (1151C) and Newly Adopted (1374C) Congressional Districts

		1151C		1374C		Statewide
		2002 Republican Primary District 23				
Office	Candidate	Vote	Percent	Vote	Percent	Percent
S. Ct. Place 4	Rodriguez - R	6,384	50.5%	10,178	47.6%	46.2%
	Smith - R	6,246	49.5%	11,213	52.4%	53.8%
VOTER REG (VR)		338,954		361,599		
SPANISH SURNAME VR AND SSVR/VR		184,117	54.3%	157,583	43.6%	20.5%
TURNOUT (TO) and TO/VR		14,953	4.4%	25,077	6.9%	6.9%
		2002 General Election District 23				
U.S. SENATOR	Cornyn - R	68,124	46.8%	89,953	56.2%	56.1%
	Kirk - D	77,553	53.2%	69,964	43.8%	43.9%
GOVERNOR	Perry - R	68,827	45.7%	91,548	56.0%	59.1%
	Sanchez - D	81,649	54.3%	71,811	44.0%	40.9%
SUPREME CT 2	Schneider - R	63,116	44.5%	83,897	54.2%	57.4%
	Yanez - D	78,824	55.5%	70,997	45.8%	42.6%
SUPREME CT 4	Smith - R	61,498	43.2%	81,228	52.1%	54.1%
	Mirabal - D	80,712	56.8%	74,649	47.9%	45.9%
CT CRIMINAL APPEALS 1	Cochran - R	66,631	47.4%	88,639	57.7%	59.3%
	Molina - D	73,877	52.6%	64,993	42.3%	40.7%
Democratic			52.5%		43.2%	42.1%
Republican			47.5%		56.8%	57.9%
VOTER REG (VR)		342,674		362,153		
SPANISH SURNAME VR AND SSVR/VR		189,340	55.3%	159,180	44.0%	20.4%
TURNOUT (TO) and TO/VR		154,392	45.1%	167,679	46.3%	44.4%

Only one hispanic candidate has defeated an Anglo in new district 23. That was in the 1998 general election where Justice Garza defeated Mr. Henderson in the g
However, in the Republican primary, Mr. Garza was defeated in new District 23

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et al.

Influence Districts In Current Plan (1151C)

2002 Dem. Primary	Estimated % Anglo Votes for Candidate	Estimated % Hisp Votes for Candidate	Estimated % Black Votes for Candidate	Estimated Anglo Influence %	Estimated Hispanic Influence %	Estimated Black Influence %	Estimated % total Votes in District	Actual % of Total Votes in District	Actual % of Total Votes in Election	Distribution of Votes: Anglo Turnout %	Black Turnout %	Hispanic Turnout %	Anglo %	Black %	Hisp. %
Cong. # 1 SANDLIN, MAX	100.0%	0.00%	100.0%	79.7%	0.0%	20.3%	100.0%	100.0%	100.0%						
Turnout 7.1%										14.5%	0.0%	10.8%	79.7%	20.3%	0.0%
2002 General Election															
Cong. # 1 LAWRENCE, JOHN	51.3%	0.0%	0.0%				45.6%	43.3%	43.6%						
SANDLIN, MAX	48.7%	0.0%	100.0%	79.5%	0.0%	20.5%	54.4%	56.7%	56.4%						
Turnout 30.70%										33.8%	0.0%	15.5%	88.9%	11.1%	0.0%
2002 Dem. Primary															
Cong. # 2 TURNER, JIM	100.0%	0.0%	100.0%	90.3%	0.0%	9.7%	100.0%	100.0%	100.0%						
Turnout 12.9%										14.5%	0.0%	10.8%	90.3%	9.7%	0.0%
2002 General Election															
Cong. # 2 BROOKSHIRE, VAN	43.5%	0.0%	0.0%				39.3%	38.1%	38.6%						
TURNER, JIM	56.5%	0.0%	100.0%	84.3%	0.0%	15.7%	60.7%	61.9%	61.4%						
Turnout 29.5%										33.8%	0.0%	15.5%	90.4%	9.6%	0.0%
2002 Dem. Primary															
Cong. # 4 HALL, RALPH M	100.0%	100.0%	100.0%	70.4%	2.5%	27.2%	100.0%	100.0%	100.0%						
Turnout 4.9%										3.6%	3.0%	15.0%	70.4%	27.2%	2.5%
2002 General Election															
Cong. # 4 GRAVES, JOHN	46.4%	0.0%	0.0%				43.3%	41.1%	41.1%						
HALL, RALPH M.	53.6%	0.0%	100.0%	88.2%	0.0%	11.8%	56.7%	58.9%	58.9%						
Turnout 36.0%										41.4%	0.0%	14.1%	93.3%	6.7%	0.0%
2002 Dem. Primary															
Cong. # 9 LAMPSON, NICK	100.0%	0.0%	100.0%	59.0%	0.0%	41.0%	100.0%	100.0%	100.0%						
Turnout 9.4%										7.4%	0.0%	17.3%	59.0%	41.0%	0.0%
2002 General Election															
Cong. # 9 LAMPSON, NICK	45.6%	0.0%	100.0%	67.40%	0.0%	32.6%	55.4%	59.3%	59.3%						
WILLIAMS, PAUL	54.4%	0.0%	0.0%				44.6%	40.7%	40.7%						
Turnout % 31.6%										36.9%	0.0%	23.3%	81.9%	18.1%	0.0%
2002 Dem. Primary															
Cong. # 11 EDWARDS, CHET	100.0%	0.0%	100.0%	96.4%	0.0%	3.6%	100.0%	100.0%	100.0%						
Turnout % 4.7%										6.5%	0.0%	0.0%	96.4%	3.6%	0.0%
2002 General Election															
Cong. # 11 EDWARDS, CHET	43.7%	0.0%	100.0%	97.5%	0.0%	2.5%	44.3%	52.9%	52.3%						
FARLEY, RAMSEY	56.3%	0.0%	0.0%				55.7%	47.1%	47.7%						
Turnout % 30.5%										46.8%	0.0%	0.0%	98.9%	1.1%	0.0%

Plaintiff - LULAC et al.

Exhibit No. 17

Influence Districts in Current Plan (1151C)

		Estimated % Anglo Votes for Candidate	Estimated % Hisp. Votes for Candidate	Estimated % Black Votes for Candidate	Estimated Anglo Influence %	Estimated Hispanic Influence %	Estimated Black Influence %	Estimated % total Votes in District	Actual % of Total Votes in District	Actual % of Total Votes in Election	Anglo Turnout %	Black Turnout %	Hispanic Turnout %	Distribution of Votes: Anglo %	Black %	Hisp. %
2002 Dem. Primary																
Cong. # 17	STENHOLM, CHAS	100.0%	100.0%	0.0%	94.5%	5.5%	0.0%	100.0%	100.0%	100.0%						
Turnout %	8.10%													0.0%	0.0%	15.0%
2002 General Election																
Cong. # 17	BECKHAM, ROB	51.9%	0.0%	0.0%				50.5%	48.0%	48.0%						
	STENHOLM, CHAS	48.1%	100.0%	0.0%	94.5%	5.5%	0.0%	49.5%	52.0%	52.0%						
Turnout %	27.90%										29.6%	4.5%	34.9%			
2002 Dem. Primary																
Cong. # 25	BELL, CHRIS	31.1%	0.0%	33.0%				31.4%	35.9%	35.9%						
	COLBERT, PAUL	47.0%	0.0%	0.0%	47.6%	0.0%	52.4%	22.6%	20.8%	20.8%						
	KING, STEPHEN	21.9%	100.0%	4.6%				14.9%	16.8%	16.8%						
	ROBINSON, CARROLL	0.0%	0.0%	62.4%				31.2%	26.5%	26.5%						
Turnout %	5.10%										4.6%	0.0%	11.7%	48.0%	49.9%	2.1%
2002 General Election																
Cong. # 25	BELL, CHRIS	37.0%	0.0%	100.0%	56.0%	0.0%	44.0%	51.2%	56.0%	56.0%						
	REISER, TOM	63.0%	0.0%	0.0%				48.8%	44.0%	44.0%						
Turnout %	25.70%										42.6%	0.0%	20.6%	77.4%	22.6%	0.0%

Expert Report of Todd Giberson

In Texas, three districts in the Congressional plan passed by the legislature in 1991 were struck down as racial gerrymanders, districts 18, 29, and 30. It is worth noting that 24 of the 30 districts in that plan (known as Plan C657) were challenged and six were not challenged at all; thus 27 of the districts in that plan survived the court's scrutiny. It is instructive to look closely at the districts from Plan C657 as well as districts from other plans when evaluating the plan currently before the court, Plan 01374C.

Compactness Measures

Generally, measures of compactness are mathematical formulae or ratios designed to assess the geometric compactness of a district's shape. In the Texas Legislative Council's RedAppl computer system two common measures of compactness are readily available to those drawing district lines: a "perimeter-to-area" ratio and a "smallest circumscribing circle" measure. The perimeter measure compares the perimeter of the district boundary to the area covered by that district using the formula $\mathbf{P^2/4\pi A}$ where P is the perimeter and A the area of the district. For the circle measure, first the dimensions of the smallest circle are found that will circumscribe or completely enclose the district. The area of that circle is then divided by the area of the district to arrive at the score. In both cases a perfect circle would receive a value of 1.0 and less regular shapes would increasingly receive higher scores.

An accompanying chart compares the perimeter compactness measures of Congressional plans C657, 01000C, 01151C, and 01374C. Plan 01000C is the original

court-ordered plan C746 which replaced C657, and was subsequently renumbered as the benchmark plan entering the 2001 round of redistricting. Plan 01151C is the court-ordered plan used in 2002. Looking at the chart, one will readily see that the districts in Plan 01374C more closely resemble the districts in 01000C and 01151C. No district in 01374C approaches the levels of non-compactness exhibited in C657. The three districts struck down from C657 are far beyond the reach of any district from the new configuration. From Plan C657 districts 18, 29, and 30 have perimeter scores of 106.3, 141.0 and 69.0 respectively. District 25 with a value of 55.2 was not among those successfully challenged. The least compact district in 01374C is district 15 with a score of 11.6 which is slightly more compact than the least compact district in 01151C (district 25 with a score of 11.8). [see accompanying tables].

A second chart compares the smallest circle compactness measures of the same four Congressional plans. It can be seen that most of the districts in 01374C are at or below the highest values found in any of the other plans, including 01151C. The exceptions are districts 15 and 25 with values of 6.5 and 8.5, respectively. These districts will be discussed in more detail later.

It is appropriate here to discuss North Carolina's district 12 which was the subject of the original *Shaw v. Reno* case. In its original configuration district 12 was a wispy-thin delineation extending from Gastonia/Charlotte on the southwest to Durham at its other extremity – taking bits and pieces of Winston-Salem, Greensboro and other cities along the way. When measures of compactness are calculated the district reports a perimeter compactness value of 82.2 and a comparatively whopping circle measure of 21.7. In the 90's,

the final disposition of district 12 was a reconfiguation extending only from Charlotte to Greensboro carrying a perimeter compactness of 24.3 and a smallest circle value of 8.6. The district in this new configuration was upheld by the U. S. Supreme Court in April of 2001.

No specific numeric values of compactness have been established as the cut-off point between what is acceptable and what is not. Nor should they be, given the limitations associated with the various measures. However, compactness measures can be useful in comparing plans and in assessing the general nature of the district lines. It can be seen from an examination of the data that the districts in 01374C are solidly within the realm of acceptability patterned by the courts.

Creating Districts Block by Block

The primary cause for objection to districts 18, 29, and 30 in Plan C657 was the way line-drawers picked apart neighborhoods block by block to include or exclude population based soley on the racial or ethnic makeup of those blocks. There appeared to be little regard for smooth boundaries or for following VTD (precinct) lines, city limit lines or other natural boundaries. A visual inspection of the shape of the three overturned districts will reveal the extreme degree to which thin fingers would reach out to snatch one block here, two blocks there. [see silhouette maps in appendix]. In Plan 01374C closer attention is paid to following more natural boundaries. The new district 25, for example, is composed almost entirely of whole counties. The northern cuts of district 28 in Comal and Hays counties are an attempt to follow VTD lines. Boundaries often adhere to city limits though sometimes to the detriment of compactness, as is the case with the inclusion of Harlingen (strip annexations and

all) into district 15. There are a few rough spots caused often by the swapping of blocks when zeroing out the population deviations among districts but the exceptions are not evidence of the type of linedrawing used and struck down in the 1990's.

Cuts into Counties

The cuts of the new district 28 into Hays and Comal counties are noted above. In the far northern reach of the district is the city of Buda and a strange looking appendage sticking out to the northwest. That appendage extends to the Oxbow Subdivision, the boundary following the old city limit of Buda and accompanying VTD line ("old" because there have been recent annexations). The appendage into Oxbow, part of the majority-minority district 28, is 97% Anglo. If race really were the predominating factor in drawing the district, then such appendages might easily have been clipped off. By itself it is not sufficiently populous to alter the minority composition of the district, but the fact that the Oxbow Subdivision remains in 28 attests to the preeminence of factors other than race as the overriding principles by which districts were created.

Compare the cut of the new district 28 into Comal county with district 28 from Plan C657. The cuts are almost identical. District 28 was one of the districts challenged in *Vera v. Richards* along with 18, 29 and 30. District 28 was not struck down; rather it was carried forward in the court-ordered remedy, 01000C.

Much has been said of the new district 25 which reaches from Hidalgo and Starr counties into Travis county. Some have said that the way the Hispanic population has been "split" into district 25 is of itself evidence of racial

gerrymandering. But is the cut into Travis county really driven predominantly by race or ethnic considerations? To answer this question we can say first of all that the boundary of district 25 in Travis county is not very irregular nor does it go to any great lengths to separate Hispanics from the neighboring districts. Moreover we can analyze the characteristics of the population near the district line, just inside the district and just outside the district. [see accompanying map of the Travis portion of 25]

The analysis is accomplished by first selecting the VTD's that lie on or adjacent to the district boundary of 25 as it cuts through the county (VTD's serve as a unit of convenience in conducting the analysis). Statistics are then compiled for the portions of those VTD's inside district 25 and for the portions just outside 25 in adjoining districts. One would expect that when a majority-minority district is adjacent to a non-minority district that there would be some drop in minority percentage from inside the district to just outside. Steeper drops in minority percentage, inside to outside, might indicate that race or ethnicity played more of a role in where the line was drawn, particularly if the line is irregular in shape.

A demonstration district will illustrate the point. Beginning with the Plan 01374C district 25 in Travis county one can first search along the boundary and bring into the district areas (at the block level) that are predominantly Hispanic. Passing along the border again, predominantly non-Hispanic blocks can be removed until the district populations are back in balance. A district boundary created in this manner can be seen in the accompanying map. By shape alone one can see that race/ethnicity has become much more of a factor in determining where the line was drawn. But what does the analysis show?

Referring to the accompanying table, the percent Hispanic (% H) inside the demonstration district 25 is 52.70 while the total Hispanic percent outside the demonstration district is 24.85, a drop of 27.85%. Likewise drops can be seen in % H VAP (Percent Hispanic Voting Age Population) and % Span (Percent Spanish Surname Registered Voters). Now refer to district 25 as it is configured in 01374C. The drop in percent Hispanic is only 13.91 (dropping from 42.10% to 28.19%), roughly half that of the demonstration plan. A real world comparison might be to look again at the cut of Comal county by district 28 in plan 01000C. The table shows a much steeper drop in percent Hispanic inside to outside the district, nearly 40 points (a 39.23 drop from 57.38% to 18.15%). Recall that this district 28 was challenged but upheld by the courts.

Coupled with visual inspection this analysis shows that race or ethnicity is not a primary factor in determining the boundary of district 25 in Travis county.

Districts 25 and 15 Revisited

Much has also been said concerning the mere extension of a district from the Rio Grande into Travis county (district 25) or into Bastrop county (district 15) some 300 miles away. It is not uncommon in Texas to have districts extending across large chunks of sparsely populated land, often connecting parts of distant cities with little in common but the state flag they fly. For example, district 23 in any recent Congressional plan extends from the outskirts of El Paso down to Laredo, dipping into San Antonio and spanning 540 miles.

State Senate districts, because they are nearly equal in population to Congressional districts, can also be useful for reference. The current Senate district 19 extends over 500 miles from El Paso to San Antonio and district 31 begins at the Oklahoma border and spans 400 miles reaching to Crane county south of Odessa. Notably Senate district 31 bypasses the nearby population center of Lubbock to connect the upper Panhandle to the Permian Basin with a one-column thin strip of counties. A demonstration plan of Hispanic congressional districts offered by the G. I. Forum (Plan 01380C) envisions a district 15 anchored in the Valley and extending into Colorado county, less than an hour's drive from Houston. The three hundred miles from the McAllen to Austin is not unreasonable. In fact, once the decision was made to add another district emanating from the Valley it became necessary to extend those districts farther north than the pre-existing Valley district footprint.

Conclusion

Having analyzed many districts, districts overturned by the courts and districts upheld, districts in Texas and districts in other states, nothing in Plan 01374C embodies the racial gerrymandering contemplated by the Supreme Court in *Shaw*. No district in 01374C can match the characteristics of the three districts overturned in Plan C657. Districts in 01374C under attack as racial gerrymanders bear resemblance to or fare better than districts upheld in previous court cases. No extraordinary steps were taken to separate populations based simply on race or ethnicity. In many cases care was taken to keep counties, VTD's and cities whole. Empirical data support these conclusions.

Todd Giberson 11/21/03

Todd Giberson, a staff analyst for the Texas Office of the Attorney General, graduated Summa Cum Laude from Southwest Texas State University with a degree in Geography and was selected as "Outstanding Senior" in his final year. He served as a Programmer/Analyst at the Texas Legislative Council during the 1990's round of redistricting when the original RedAppl redistricting software was developed. Todd came to the Office of the Attorney General in 1994 where he continued to be involved in all aspects of redistricting analysis as well as other Geographic Information Systems (GIS) projects such as the development of the agency's Colonia Geographic Database.

C657

District Compactness in Congressional Plan C657

DISTRICT	PERI	CIRC
1	7.2	2.7
2	8.6	1.8
3	23.7	3.4
4	10.4	4.0
5	9.9	3.1
6	42.5	4.6
7	8.6	3.0
8	11.5	3.0
9	5.4	2.5
10	3.2	2.3
11	3.1	2.4
12	16.9	2.6
13	5.4	2.8
14	9.8	2.6
15	7.9	5.1
16	4.7	5.1
17	2.6	2.4
18	106.3	2.7
19	6.2	5.0
20	8.2	3.0
21	11.0	4.5
22	13.4	2.5
23	5.8	4.2
24	14.9	2.9
25	55.2	5.0
26	7.5	2.4
27	4.6	3.1
28	6.2	3.8
29	141.0	5.1
30	69.0	4.1
MEDIAN	8.6	3.0
MEAN	21.0	3.4

PERI - Compares the AREA (A) and PERIMETER (P) of a district according to the formula $P^2 / 4\pi A$

CIRC - Compares the area of the smallest or minimum circumscribing circle (MCC) and the area of the district according to the formula Area of MCC / Area of District

Note that compactness statistics are formulated such that a perfect circle would yield a value of 1.0 in both measures and values would increase from that base. Thus the higher the value, the less compact is the district using the selected compactness measure.

01000C

District Compactness in Congressional Plan 01000C

DISTRICT	PERI	CIRC
1	7.3	2.7
2	8.6	1.8
3	5.5	3.1
4	10.6	4.0
5	8.5	3.1
6	37.5	4.8
7	4.0	3.4
8	11.4	3.0
9	5.2	2.5
10	3.2	2.3
11	3.2	2.4
12	16.9	2.6
13	5.4	2.8
14	9.8	2.6
15	7.9	5.1
16	4.7	5.1
17	2.7	2.4
18	6.6	2.9
19	6.2	5.0
20	8.1	3.0
21	11.0	4.5
22	9.5	2.4
23	5.8	4.2
24	9.7	2.9
25	10.6	4.4
26	4.7	2.4
27	4.6	3.2
28	6.2	3.8
29	5.6	2.6
30	5.6	2.6
MEDIAN	6.4	3.0
MEAN	8.2	3.3

PERI - Compares the AREA (A) and PERIMETER (P) of a district according to the formula $P^2 / 4\pi A$

CIRC - Compares the area of the smallest or minimum circumscribing circle (MCC) and the area of the district according to the formula Area of MCC / Area of District

Note that compactness statistics are formulated such that a perfect circle would yield a value of 1.0 in both measures and values would increase from that base. Thus the higher the value, the less compact is the district using the selected compactness measure.

01151C

District Compactness in Congressional Plan 01151C

DISTRICT	PERI	CIRC
1	5.3	2.3
2	5.9	1.9
3	3.5	1.7
4	8.9	4.9
5	6.3	2.5
6	2.8	1.9
7	2.7	1.9
8	3.7	2.9
9	4.7	2.5
10	2.1	1.9
11	3.5	2.1
12	1.9	2.0
13	2.7	2.9
14	4.6	2.0
15	8.5	5.0
16	3.8	2.9
17	2.7	2.0
18	8.5	2.8
19	4.3	2.9
20	7.1	2.9
21	3.2	1.8
22	7.1	2.4
23	6.1	4.2
24	6.1	3.1
25	11.8	4.4
26	2.7	1.8
27	4.1	3.1
28	5.4	3.7
29	7.7	2.8
30	4.7	2.7
31	6.7	3.8
32	3.0	2.3
MEDIAN	4.7	2.6
MEAN	5.1	2.8

PERI - Compares the AREA (A) and PERIMETER (P) of a district according to the formula $P^2 / 4\pi A$

CIRC - Compares the area of the smallest or minimum circumscribing circle (MCC) and the area of the district according to the formula Area of MCC / Area of District

Note that compactness statistics are formulated such that a perfect circle would yield a value of 1.0 in both measures and values would increase from that base. Thus the higher the value, the less compact is the district using the selected compactness measure.

01374C

District Compactness in Congressional Plan 01374C

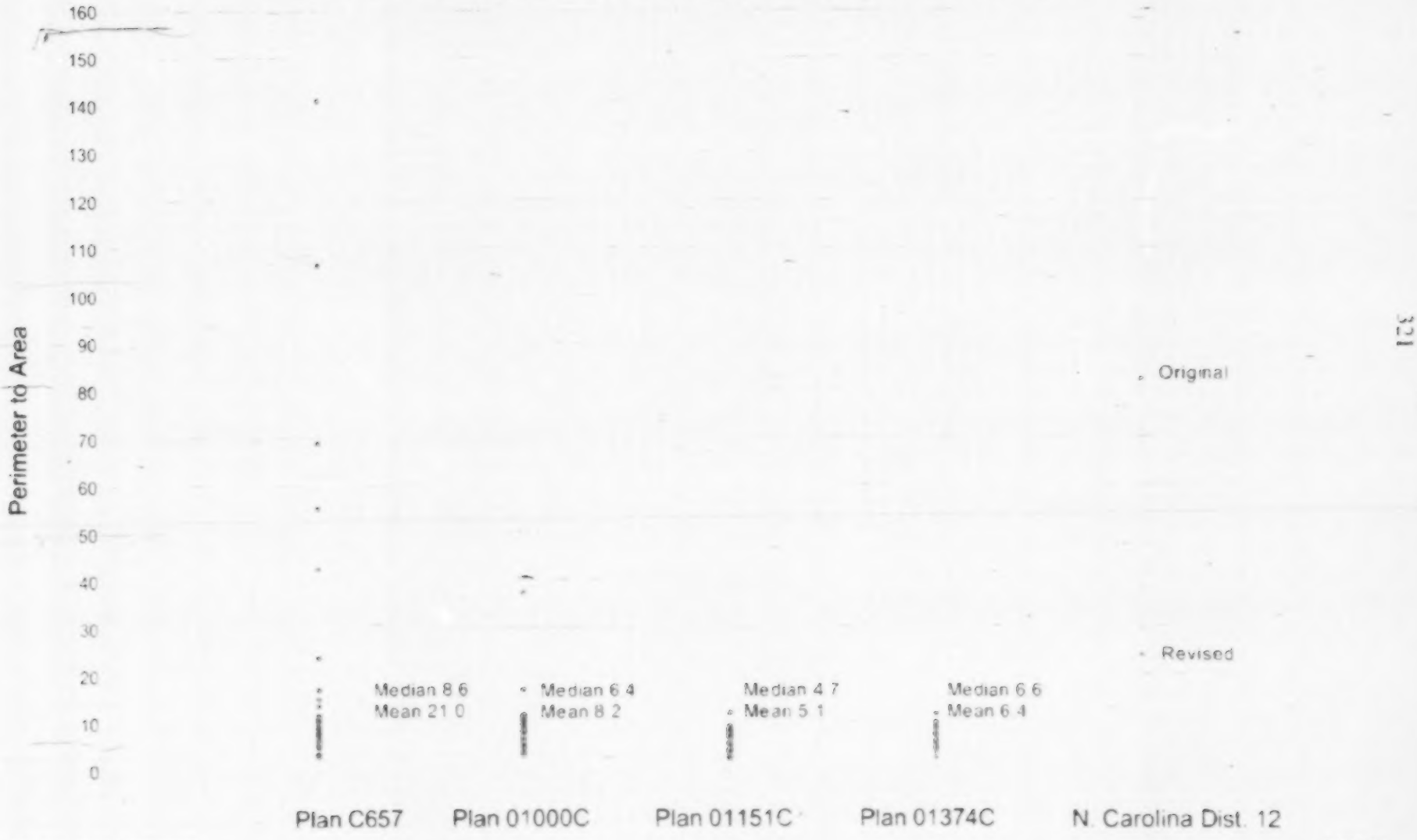
DISTRICT	PERI	CIRC
1	3.8	2.2
2	8.8	4.3
3	5.7	2.4
4	4.7	2.5
5	7.1	3.0
6	7.2	4.4
7	5.7	2.6
8	4.3	2.2
9	6.8	3.7
10	7.0	4.2
11	4.0	3.1
12	2.2	1.8
13	5.0	3.1
14	6.9	3.9
15	11.6	6.5
16	3.8	2.9
17	5.9	4.4
18	8.9	2.2
19	6.4	3.4
20	7.3	3.0
21	7.1	2.8
22	9.8	3.4
23	5.1	3.8
24	7.5	3.4
25	9.6	8.5
26	6.7	5.2
27	5.1	3.1
28	5.7	5.0
29	8.6	3.1
30	4.0	2.3
31	4.1	3.2
32	8.9	2.9
MEDIAN	6.6	3.1
MEAN	6.4	3.5

PERI - Compares the AREA (A) and PERIMETER (P) of a district according to the formula $P^2 / 4\pi A$

CIRC - Compares the area of the smallest or minimum circumscribing circle (MCC) and the area of the district according to the formula Area of MCC / Area of District

Note that compactness statistics are formulated such that a perfect circle would yield a value of 1.0 in both measures and values would increase from that base. Thus the higher the value, the less compact is the district using the selected compactness measure.

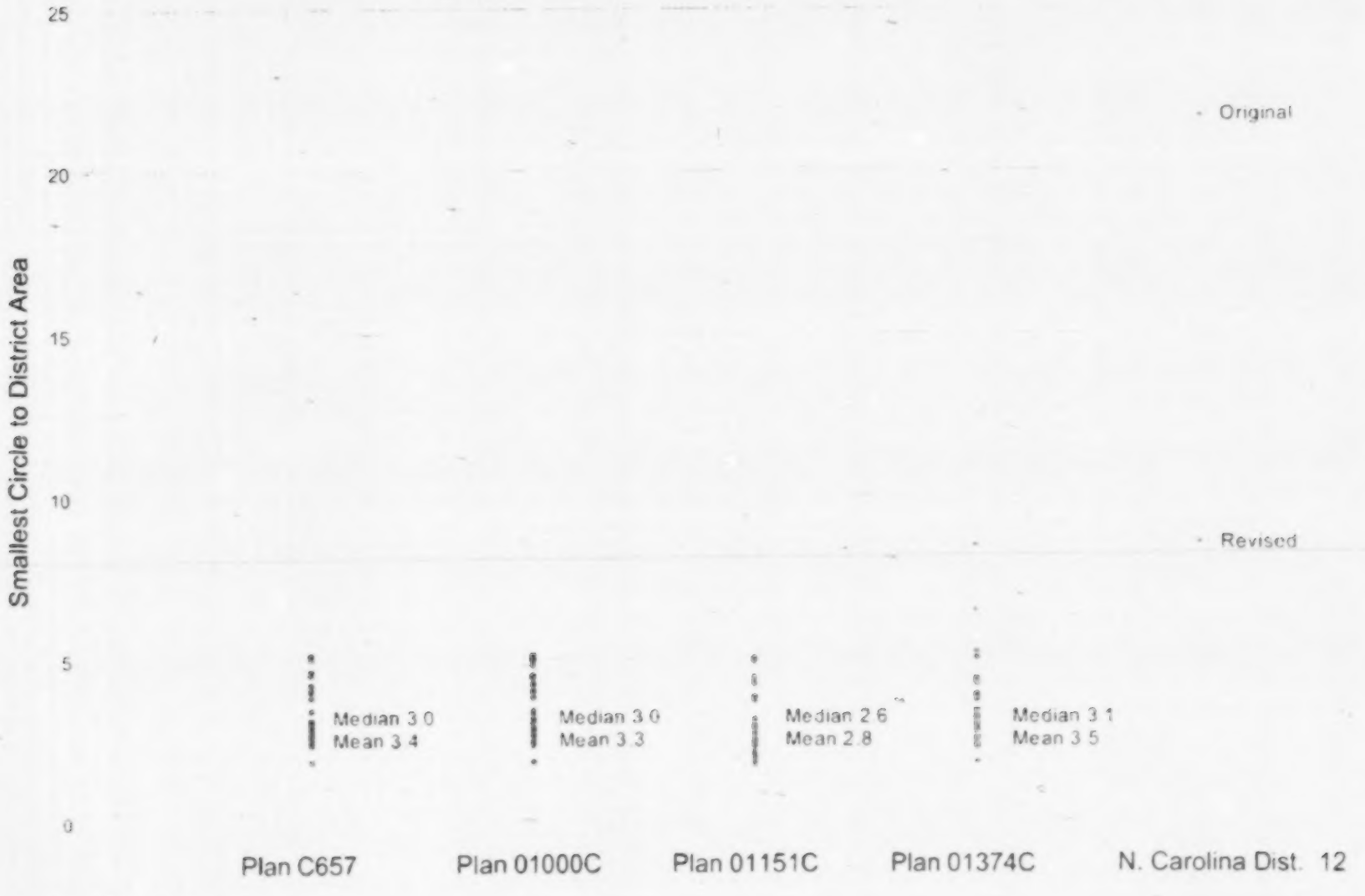
Plan Comparison
Of Perimeter Compactness Scores



Privileged and Confidential

Plan Comparison

Smallest Circle Compactness Scores



Privileged and Confidential

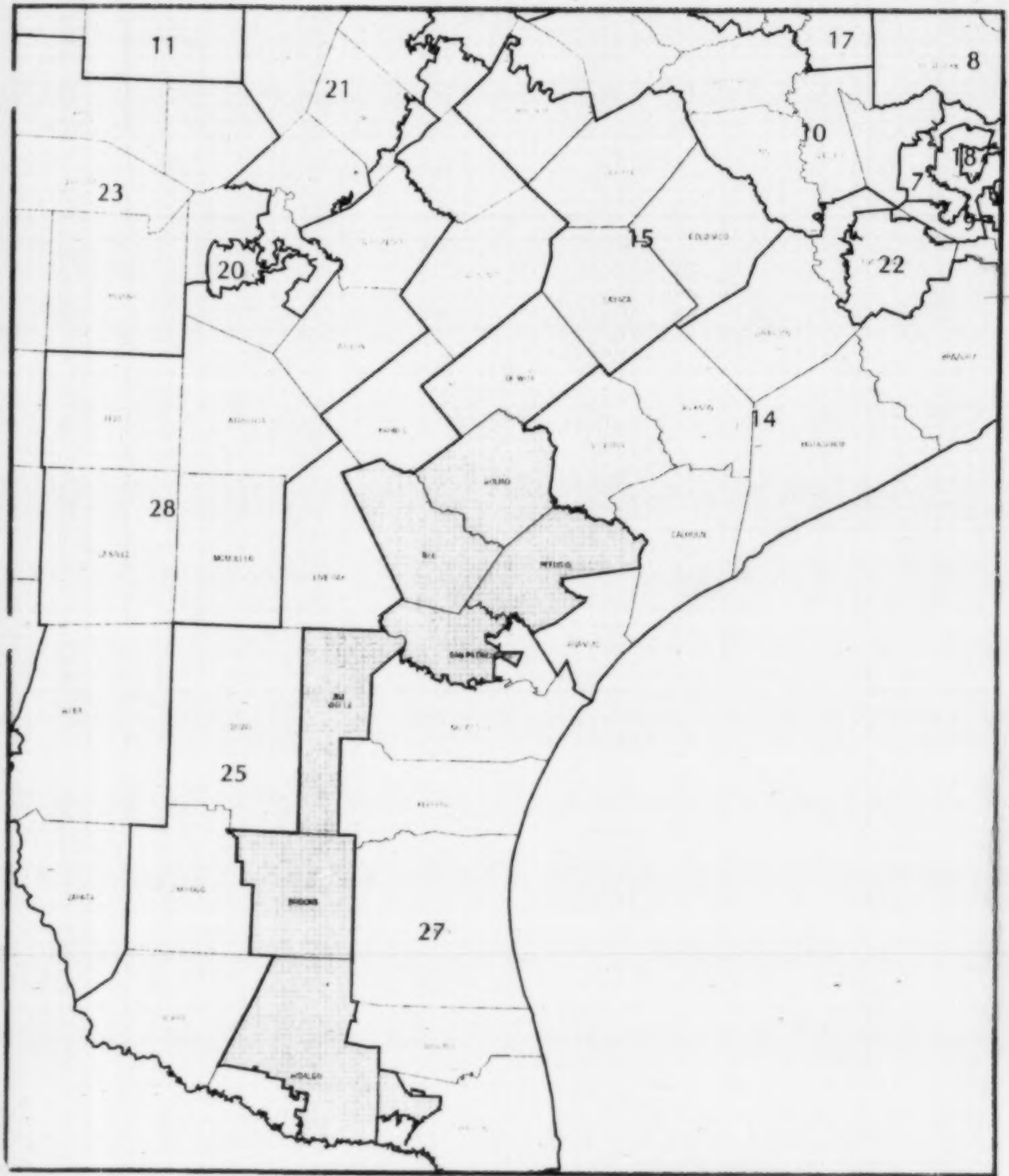
Plan C657 - District 18

Plan C657 - District 29

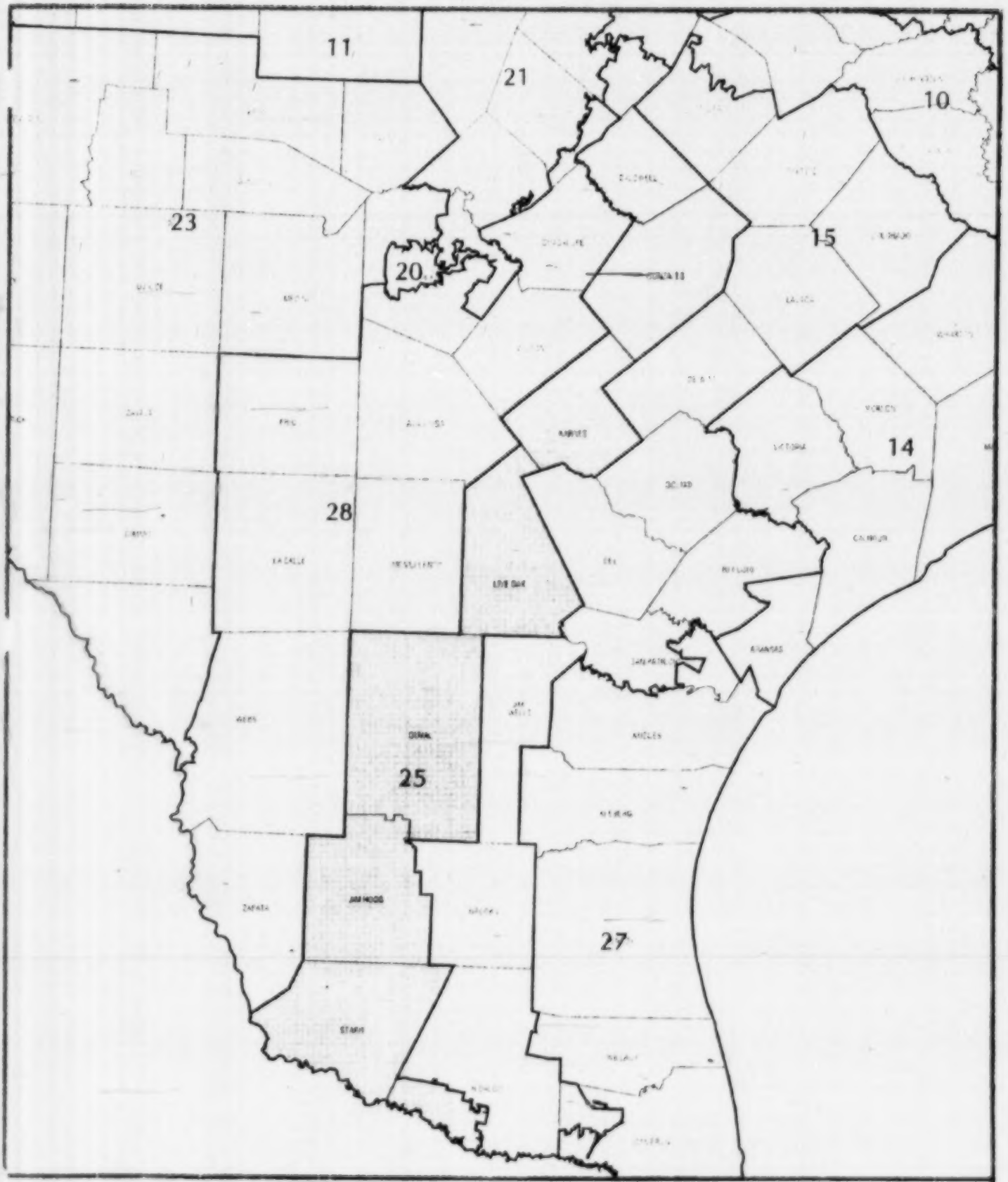
Plan C657 - District 30

Original North Carolina District 12

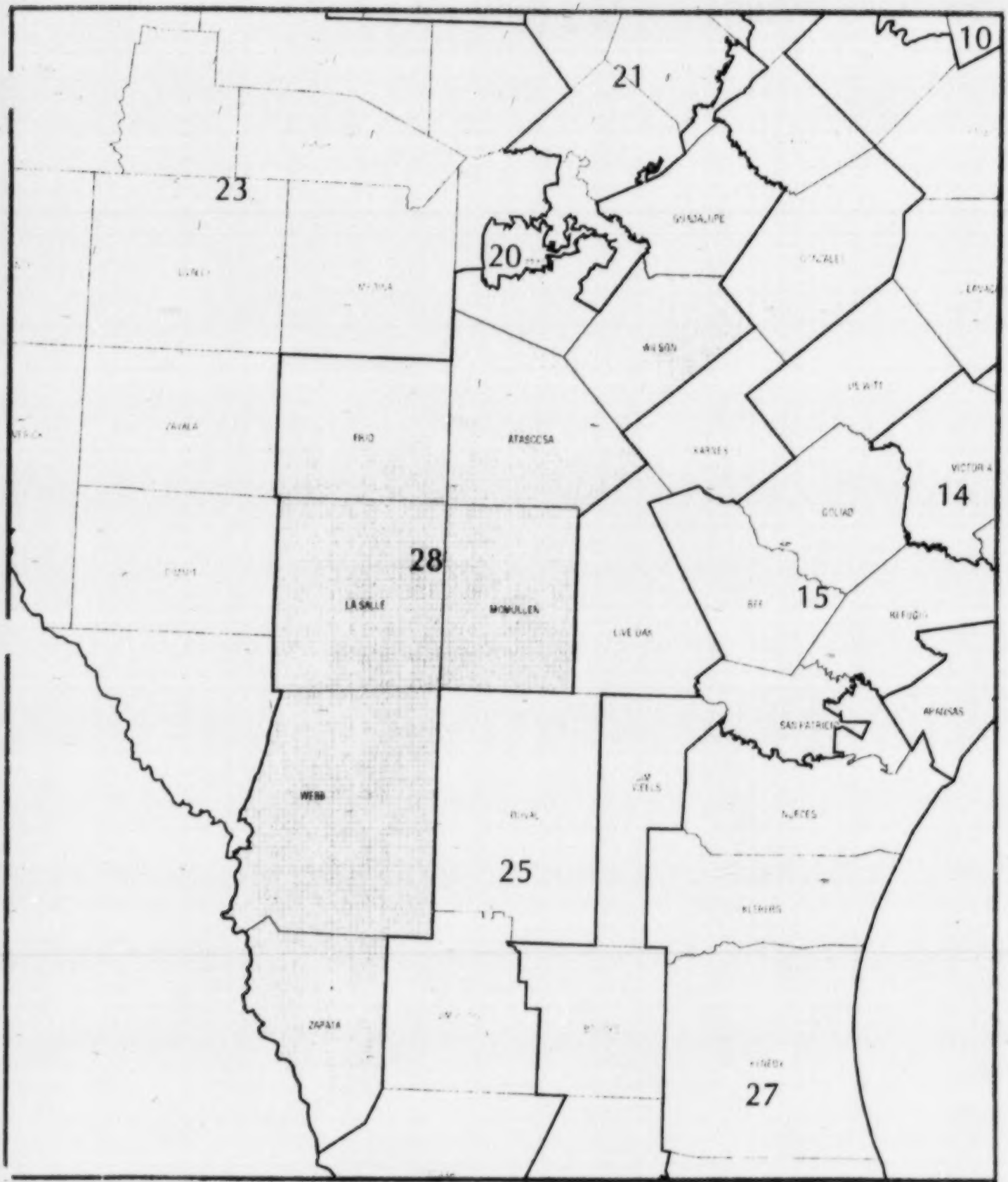
Revised North Carolina District 12



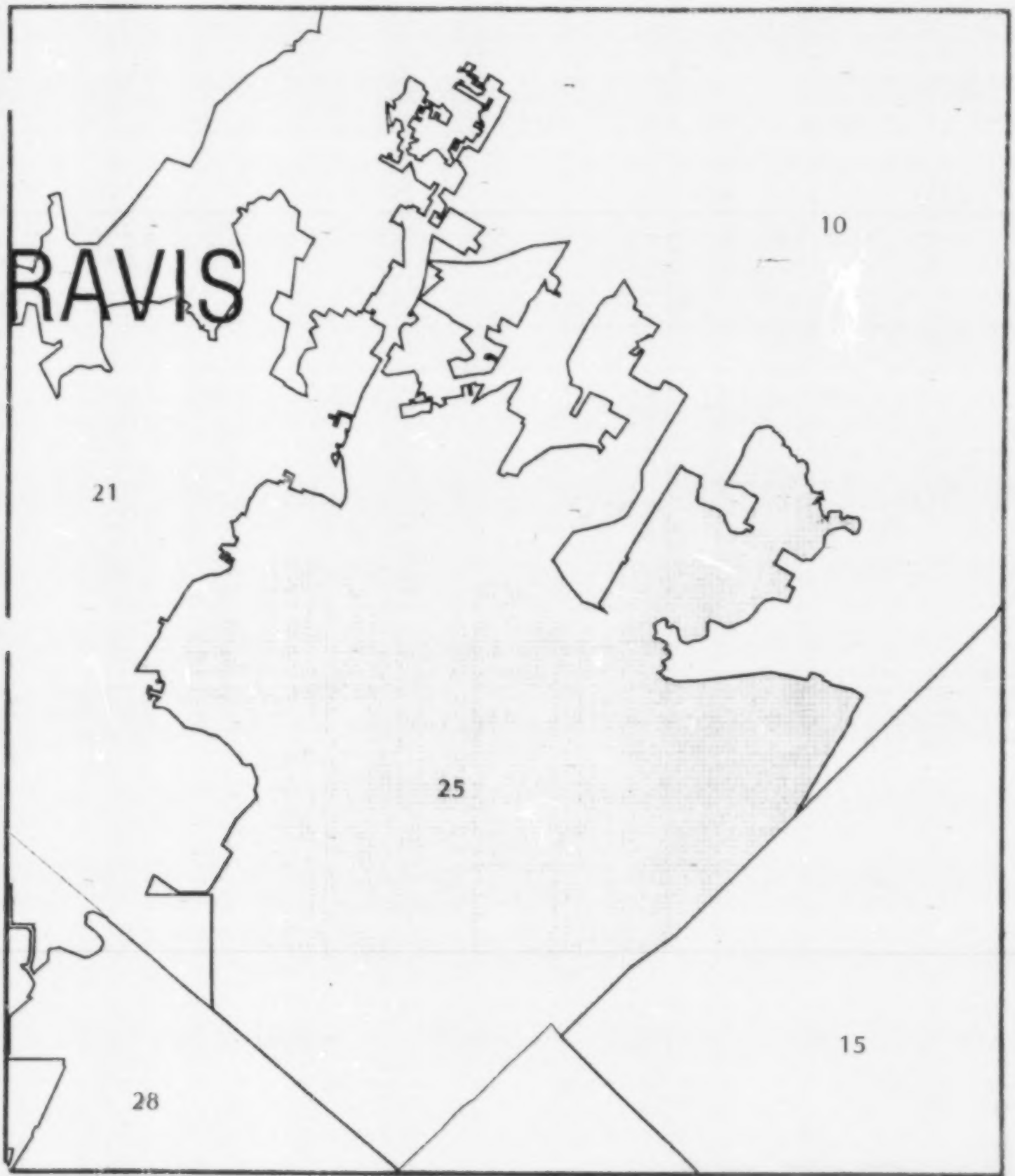
Plan 01374C - District 15



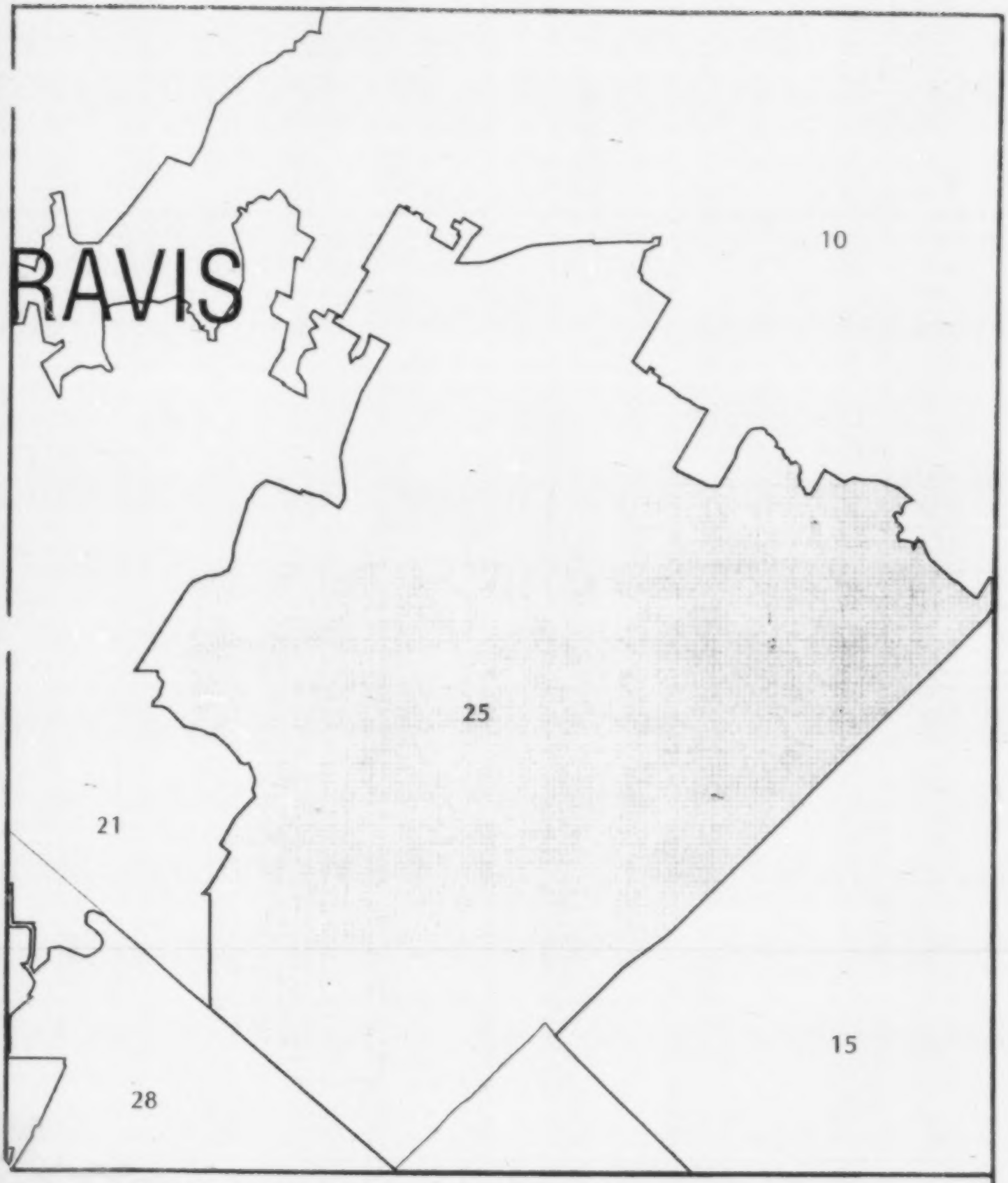
Plan 01374C - District 25



Plan 01374C - District 28



Demonstration Plan - District 25 in Travis



Plan 01374C - District 25 in Travis

Analysis of VTD's at District Boundary

Demonstration District for 25 in Travis County

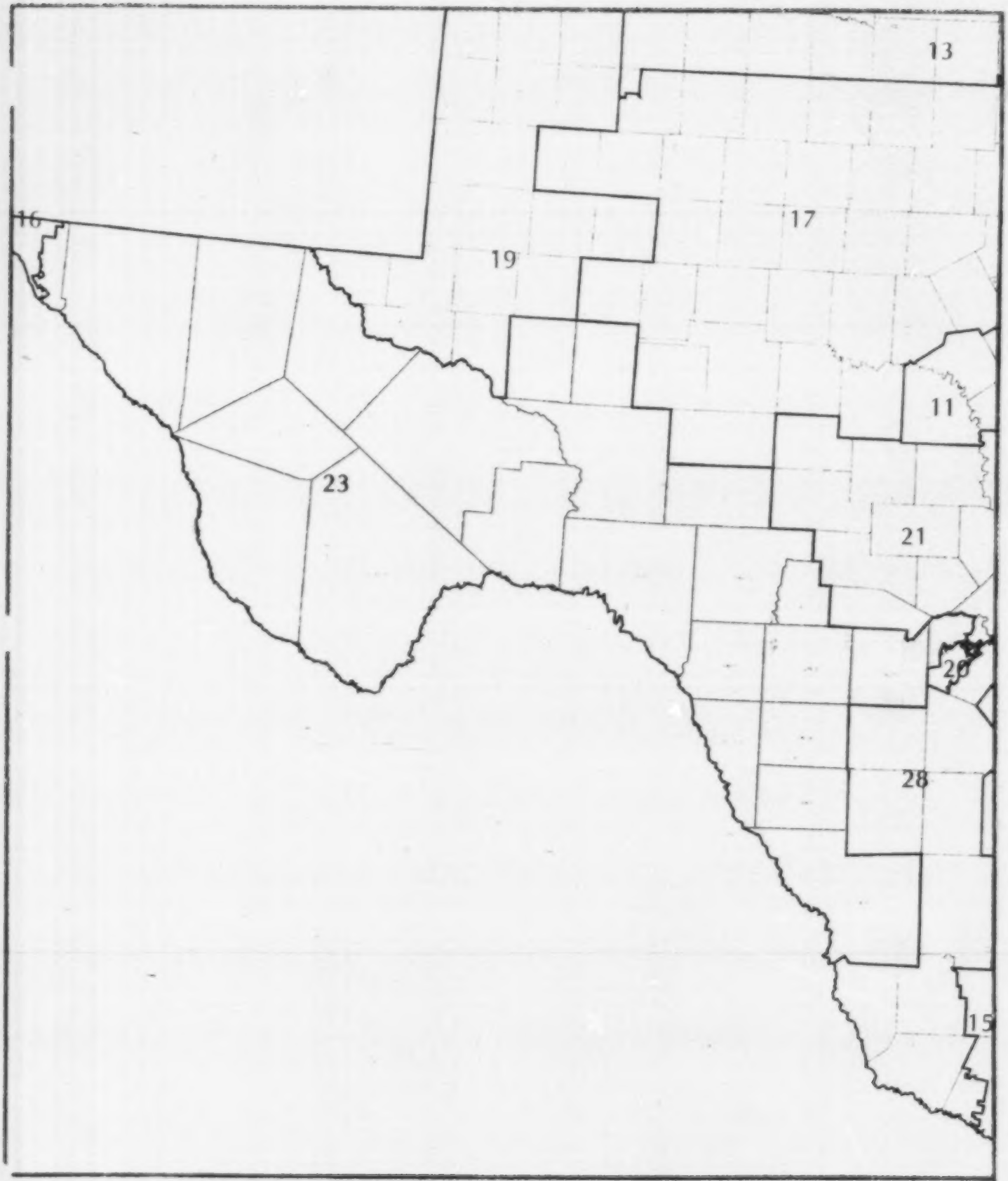
District	In/Out	Out Dist	Total POP	% B	% H	% B+H	% B VAP	% H VAP	% B+H VA	Voter Reg	% Span	Turnout	TO/VR	% DEM 02	% REP 02	% DEM LT	% REP LTG
25	Inside		155,781	17.04%	52.70%	68.99%	15.97%	47.99%	63.43%	55,484	30.81%	25,788	46.48%	74.14%	25.86%	77.57%	22.43%
25	Outside	10	78,312	24.39%	25.63%	49.49%	22.12%	22.51%	44.28%	35,593	10.77%	16,065	45.13%	69.05%	30.95%	73.39%	26.61%
25	Outside	21	37,430	5.09%	23.24%	27.95%	4.74%	20.31%	24.81%	22,100	15.89%	11,728	53.07%	61.69%	38.31%	68.24%	31.76%
25	Outside	Total	115,742	18.15%	24.85%	42.52%	16.30%	21.77%	37.76%	57,693	12.73%	27,792	48.17%	65.95%	34.05%	71.21%	28.79%

Actual 01374C District 25 in Travis County

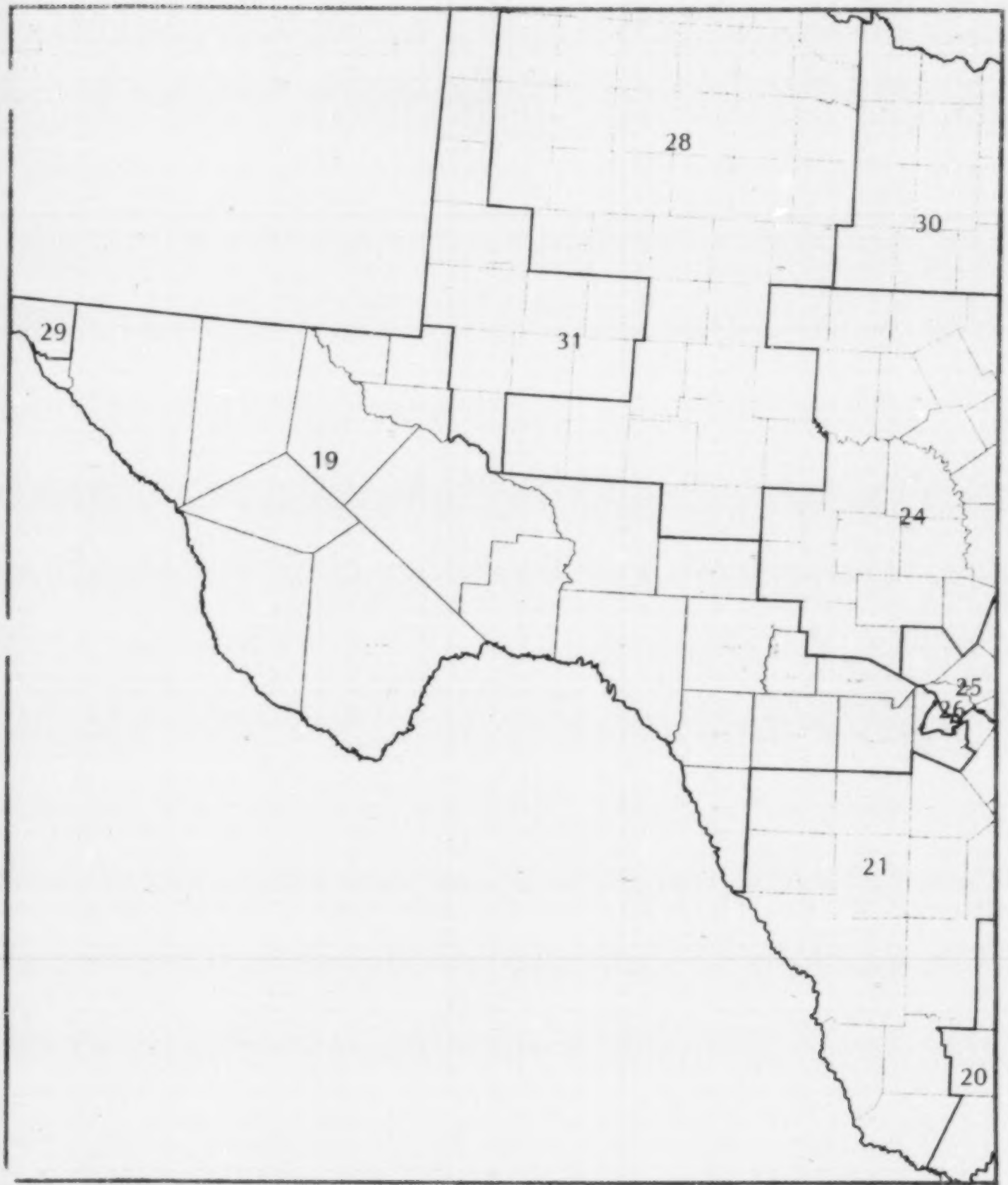
District	In/Out	Out Dist	Total POP	% B	% H	% B+H	% B VAP	% H VAP	% B+H VA	Voter Reg	% Span	Turnout	TO/VR	% DEM 02	% REP 02	% DEM LT	% REP LTG
25	Inside		96,898	17.41%	42.10%	58.81%	15.33%	37.79%	52.60%	40,610	23.58%	19,167	47.20%	74.88%	25.12%	78.53%	21.47%
25	Outside	10	26,556	14.28%	36.19%	50.01%	13.19%	31.55%	44.41%	11,303	14.07%	5,797	51.29%	65.03%	34.97%	69.97%	30.03%
25	Outside	21	49,358	5.31%	23.56%	28.52%	4.91%	20.33%	25.02%	25,840	16.41%	13,609	52.67%	62.82%	37.18%	68.94%	31.06%
25	Outside	Total	77,914	8.60%	28.19%	36.39%	7.76%	24.19%	31.69%	37,144	15.70%	19,406	52.25%	63.48%	36.52%	69.25%	30.75%

Actual 01000C District 28 in Comal County

District	In/Out	Out Dist	Total POP	% B	% H	% B+H	% B VAP	% H VAP	% B+H VAI	Voter Reg	% Span	Turnout	TO/VR	% DEM 02	% REP 02	% DEM LTC	% REP LTG
28	Inside		15,438	1.99%	57.38%	59.09%	1.69%	53.62%	55.13%	8,129	50.00%	2,442	30.04%	44.99%	55.01%	49.23%	50.77%
28	Outside	21	26,182	1.34%	18.15%	19.32%	1.12%	15.79%	16.84%	17,905	12.19%	8,793	49.11%	21.21%	78.79%	30.87%	69.13%
28	Outside	Total	26,182	1.34%	18.15%	19.32%	1.12%	15.79%	16.84%	17,905	12.19%	8,793	49.11%	21.21%	78.79%	30.87%	69.13%

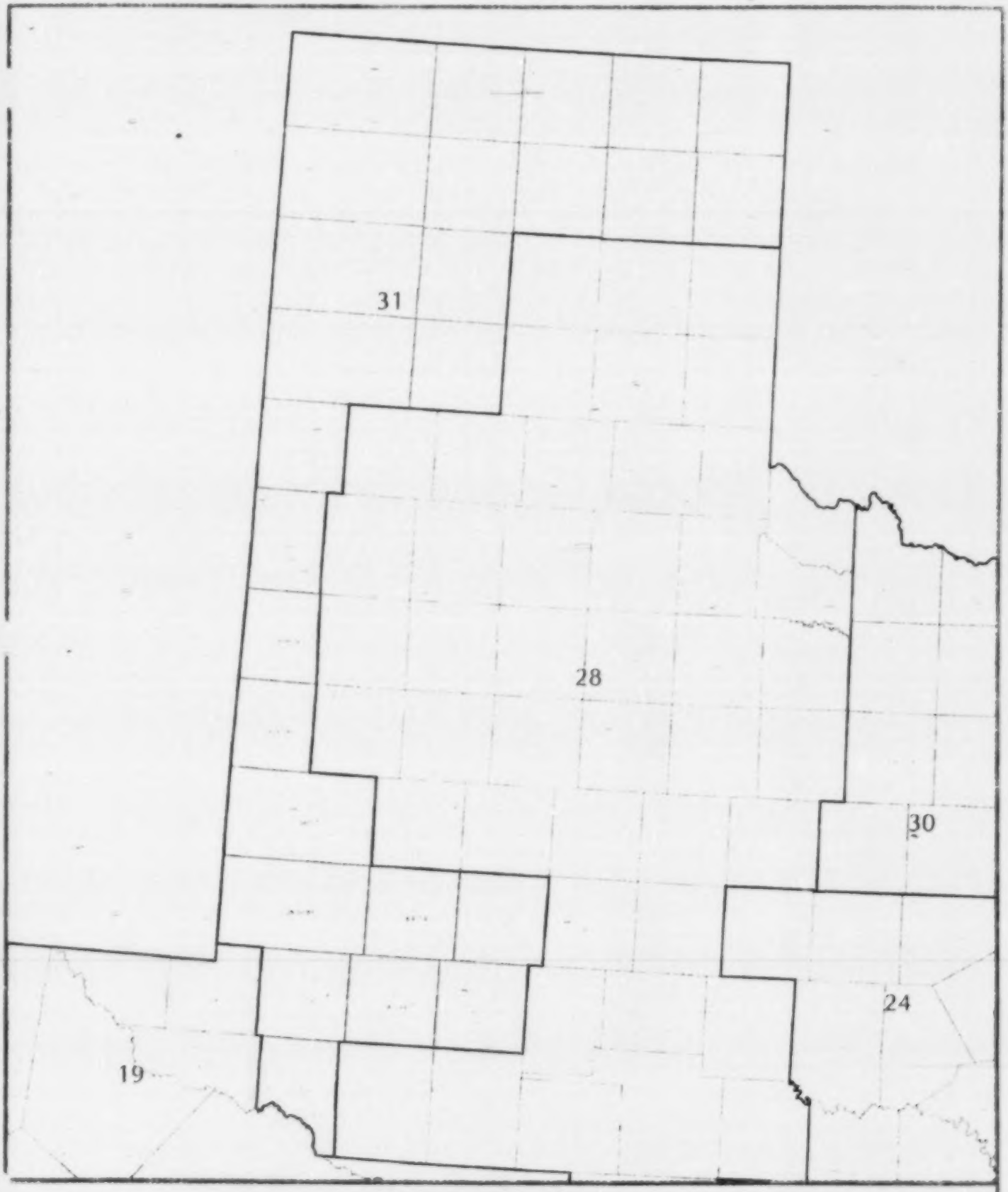


Plan 01151C - District 23



State Senate Plan 01188C - District 19

BEST AVAILABLE COPY



State Senate Plan 01188C - District 31

Plan	Name	District	POP	Dev	%Dev	%Black POP	%Black VAP	% Hisp POP	% Hisp VAP	%Span Sur	Indx_r_02	Ltg_r_02	CPA _r_02
PUBLC01151	Sandlin(D)	1	651,619	0	0.0	16.6	15.4	7.4	6.0	2.0	58.1	51.3	65.8
PUBLC01151	Turner(D)	2	651,619	0	0.0	14.2	13.6	8.8	7.7	3.3	56.4	50.9	64.6
PUBLC01151	Johnson(R)	3	651,620	1	0.0	7.1	6.4	14.4	12.9	5.9	72.4	67.3	78.6
PUBLC01151	Hall(D)	4	651,620	1	0.0	12.1	11.2	9.4	7.7	3.1	68.1	62.4	74.8
PUBLC01151	Sessions(R), Hensarling(R)	5	651,620	1	0.0	16.4	14.9	17.7	15.3	7.2	59.6	55.1	67.3
PUBLC01151	Barton(R)	6	651,620	1	0.0	10.8	9.7	13.5	11.7	7.3	65.2	60.4	72.6
PUBLC01151	Culberson(R)	7	651,620	1	0.0	12.1	10.8	25.9	23.3	11.4	69.2	64.2	75.8
PUBLC01151	Brady(R)	8	651,619	0	0.0	5.6	5.1	13.0	11.6	7.1	78.6	74.6	84.1
PUBLC01151	Lampson(D)	9	651,619	0	0.0	21.8	20.3	14.4	12.9	8.5	52.2	48.9	60.0
PUBLC01151	Doggett(D)	10	651,619	0	0.0	11.8	10.5	33.0	29.0	18.9	40.0	32.9	53.1
PUBLC01151	Edwards(D)	11	651,620	1	0.0	16.7	15.0	16.4	14.1	9.5	62.8	58.1	71.0
PUBLC01151	Granger(R)	12	651,619	0	0.0	4.9	4.6	19.9	17.1	9.5	66.3	61.3	74.1
PUBLC01151	Thornberry(R)	13	651,619	0	0.0	6.1	5.7	21.6	17.9	11.9	69.4	62.5	78.4
PUBLC01151	Paul(R)	14	651,620	1	0.0	8.3	7.8	32.0	28.4	20.3	60.2	49.3	70.3
PUBLC01151	Hinojosa(D)	15	651,619	0	0.0	1.6	1.8	78.3	74.3	67.0	38.3	35.8	45.7
PUBLC01151	Reyes(D)	16	651,619	0	0.0	3.6	3.4	77.7	74.8	67.5	35.6	38.4	46.5
PUBLC01151	Stenholm(D)	17	651,619	0	0.0	4.2	4.0	19.6	16.6	12.1	67.2	58.2	76.0
PUBLC01151	JacksonLee(D)	18	651,620	1	0.0	43.0	42.1	32.6	29.1	14.2	24.8	23.6	32.0
PUBLC01151	Neugebauer(R)	19	651,619	0	0.0	6.1	5.5	34.1	29.6	24.2	70.5	63.7	78.1
PUBLC01151	Gonzalez(D)	20	651,619	0	0.0	6.2	6.0	68.2	64.3	61.5	38.5	37.5	48.6
PUBLC01151	Smith(R)	21	651,619	0	0.0	2.4	2.1	17.2	15.2	11.4	70.8	61.4	78.6
PUBLC01151	DeLay(R)	22	651,619	0	0.0	10.6	10.2	19.7	18.0	12.8	67.0	62.5	74.3
PUBLC01151	Bonilla(R)	23	651,619	0	0.0	1.8	1.8	66.8	63.0	55.3	47.5	42.8	57.5
PUBLC01151	Frost(D)	24	651,619	0	0.0	22.7	21.4	38.0	33.6	18.0	41.9	39.4	48.9
PUBLC01151	Bell(D)	25	651,619	0	0.0	23.7	22.0	34.3	30.7	15.2	48.5	44.4	57.5
PUBLC01151	Burgess(R)	26	651,619	0	0.0	5.5	5.1	11.0	10.0	5.3	74.2	69.6	80.7
PUBLC01151	Ortiz(D)	27	651,619	0	0.0	2.6	2.4	71.6	67.5	61.6	43.3	40.8	54.0
PUBLC01151	Rodriguez(D)	28	651,620	1	0.0	8.2	8.2	69.6	65.7	59.6	35.2	33.9	43.3
PUBLC01151	Green(D)	29	651,620	1	0.0	15.3	14.7	62.2	58.2	42.5	32.7	32.5	40.6
PUBLC01151	Johnson(D)	30	651,620	1	0.0	41.4	40.3	31.1	27.7	11.4	27.1	25.8	32.5
PUBLC01151	Carter(R)	31	651,620	1	0.0	9.6	8.9	16.9	14.9	9.1	69.3	61.5	76.6
PUBLC01151		32	651,619	0	0.0	9.7	9.1	27.4	24.1	8.3	65.9	59.0	73.4

STATE'S EXHIBIT 24

Plan	Name	Distrct	POP	Dev	%Dev	%Black POP	%Black VAP	% Hisp POP	% Hisp VAP	%Span Sur	Indx_r_02	Ltg_r_02	CPA _r_02
PUBLC01374	Sandlin(D)	1	651,619	0	0.0	18.8	17.5	9.3	7.5	2.9	63.0	55.1	70.1
PUBLC01374	Green(D), Lampson(D)	2	651,620	1	0.0	19.5	18.4	12.6	11.3	6.7	60.6	57.2	67.4
PUBLC01374	Johnson(R)	3	651,619	0	0.0	9.9	9.1	16.9	15.3	6.3	70.0	65.2	76.3
PUBLC01374	Hall(D)	4	651,619	0	0.0	10.8	10.0	7.9	6.7	2.7	63.0	58.0	70.1
PUBLC01374	Hensarling(R)	5	651,619	0	0.0	12.9	11.8	12.9	11.1	5.3	64.2	58.6	71.7
PUBLC01374	Barton(R), Turner(D) Frost(D)	6	651,619	0	0.0	13.5	12.3	15.9	13.9	7.1	64.1	58.8	71.8
PUBLC01374	Bell(D), Culberson(R)	7	651,620	1	0.0	6.1	5.5	18.0	16.0	8.4	70.2	64.0	77.5
PUBLC01374	Brady(R)	8	651,620	1	0.0	9.0	8.7	9.0	8.0	4.0	66.6	62.8	73.4
PUBLC01374		9	651,619	0	0.0	38.3	36.5	32.8	30.3	13.7	30.2	29.0	38.1
PUBLC01374	Doggett(D)	10	651,620	1	0.0	9.7	9.0	18.7	16.8	9.1	63.5	56.4	72.4
PUBLC01374		11	651,620	1	0.0	4.4	4.1	29.6	25.3	19.3	69.8	61.5	77.1
PUBLC01374	Granger(R)	12	651,619	0	0.0	6.1	5.7	23.7	20.4	11.3	63.0	58.0	71.0
PUBLC01374	Thornberry(R)	13	651,620	1	0.0	6.2	5.9	17.6	14.6	9.4	68.9	62.3	78.1
PUBLC01374	Paul(R)	14	651,619	0	0.0	10.3	9.9	24.9	22.1	14.0	61.0	52.7	69.9
PUBLC01374	Hinojosa(D)	15	651,619	0	0.0	3.1	3.3	69.0	64.0	56.7	44.3	39.3	53.7
PUBLC01374	Reyes(D)	16	651,619	0	0.0	3.6	3.4	77.7	74.8	67.5	35.6	38.4	46.5
PUBLC01374	Edwards(D)	17	651,620	1	0.0	10.8	9.6	15.4	13.1	7.6	64.0	58.6	71.4
PUBLC01374	JacksonLee(D)	18	651,619	0	0.0	41.0	40.3	35.6	32.2	16.0	26.0	25.1	33.0
PUBLC01374	Neugebauer(R), Stenholm(D)	19	651,619	0	0.0	5.9	5.2	29.0	24.8	19.9	69.0	60.1	77.6
PUBLC01374	Gonzalez(D)	20	651,619	0	0.0	7.5	7.1	67.1	63.6	59.9	37.7	36.9	47.7
PUBLC01374	Smith(R)	21	651,619	0	0.0	4.3	3.8	18.1	16.2	12.9	63.8	54.7	73.2
PUBLC01374	DeLay(R)	22	651,619	0	0.0	9.8	9.3	20.3	18.3	12.9	65.9	61.7	73.3
PUBLC01374	Bonilla(R)	23	651,620	1	0.0	2.0	1.9	55.1	50.9	44.0	56.8	51.3	65.8
PUBLC01374		24	651,620	1	0.0	10.3	9.3	17.9	15.8	8.8	67.6	63.2	74.4
PUBLC01374		25	651,619	0	0.0	8.0	8.0	68.6	63.4	55.6	30.2	27.5	39.8
PUBLC01374	Burgess(R)	26	651,619	0	0.0	16.1	15.0	14.3	12.5	5.8	62.4	58.9	68.6
PUBLC01374	Ortiz(D)	27	651,619	0	0.0	2.9	2.8	68.1	64.2	58.0	44.4	41.3	54.8
PUBLC01374	Rodriguez(D)	28	651,620	1	0.0	6.6	6.8	64.5	60.1	54.3	41.1	38.3	50.8
PUBLC01374		29	651,619	0	0.0	10.4	9.9	66.1	61.8	45.9	35.8	35.5	43.9
PUBLC01374	Johnson(D)	30	651,620	1	0.0	42.3	41.0	34.2	30.7	12.5	22.7	21.5	28.6
PUBLC01374	Carter(R)	31	651,619	0	0.0	14.2	12.9	16.3	14.2	9.9	65.1	58.5	73.6
PUBLC01374	Sessions(R)	32	651,620	1	0.0	8.3	7.8	36.2	31.4	13.3	64.3	57.6	71.9

STATE'S EXHIBIT 43

	CITIZENSHIP POPULATION AND PERCENT						CITIZENSHIP VOTING AGE POPULATION AND PERCENT					
DISTRICT	TOTAL	BLACK	HISPANIC	B+H	ANGLO	OTHER	TOTAL	BLACK	HISPANIC	B+H	ANGLO	OTHER
1	632,552	16.9	4.8	21.6	76.7	1.5	469,766	15.8	3.3	19.0	79.4	1.5
2	633,662	14.5	6.5	20.9	77.4	1.5	470,010	14.0	5.2	19.1	79.4	1.4
3	583,679	7.5	10.0	17.4	75.9	6.6	405,752	6.9	7.5	14.3	79.7	5.9
4	626,967	12.5	6.2	18.5	79.4	2.0	457,367	11.5	4.1	15.6	82.4	1.9
5	603,316	17.2	12.6	29.6	67.9	2.5	435,151	15.8	9.3	25.0	72.6	2.3
6	619,337	10.9	10.7	21.5	75.2	3.2	434,135	9.8	8.5	18.2	78.7	3.0
7	530,023	13.6	18.8	32.1	57.9	9.7	376,099	12.1	14.0	26.2	64.3	9.5
8	611,338	5.6	9.7	15.5	80.8	3.6	427,808	5.3	7.8	13.1	83.6	3.3
9	620,385	22.6	11.7	34.1	62.6	3.3	452,592	21.3	9.7	30.7	66.2	2.8
10	571,197	13.0	27.0	39.6	55.6	4.5	432,441	11.7	21.9	33.3	61.9	4.6
11	629,673	16.8	14.3	30.6	65.9	3.0	453,738	15.3	11.6	26.6	70.3	2.9
12	604,497	5.0	15.3	20.2	76.2	3.5	434,659	4.7	11.7	16.3	80.4	3.2
13	625,686	6.1	18.9	24.8	72.5	2.5	453,118	5.7	14.8	20.5	77.0	2.5
14	626,300	8.5	29.5	37.6	60.3	1.8	452,226	8.2	25.4	33.4	64.8	1.7
15	555,622	1.8	75.1	76.7	22.2	0.9	358,017	2.1	69.3	71.4	27.5	1.0
16	553,425	4.1	74.6	77.9	19.8	1.7	369,793	4.3	69.9	73.6	24.1	1.9
17	634,733	4.1	17.9	21.9	76.4	1.7	470,035	4.0	14.5	18.4	79.9	1.6
18	564,287	49.5	23.7	73.7	23.8	2.1	398,455	49.8	17.8	67.3	29.2	3.3
19	624,522	6.6	32.0	38.1	60.2	1.5	442,392	5.6	26.8	32.5	65.9	1.4
20	601,338	6.4	66.2	72.1	25.2	2.2	420,069	6.3	61.6	67.6	29.8	2.3
21	629,009	2.4	15.8	18.1	79.0	2.8	469,626	2.1	13.6	15.7	81.6	2.6
22	605,485	11.1	17.5	28.3	63.5	7.9	416,911	10.7	15.2	25.8	66.7	7.4
23	574,519	1.0	63.0	64.7	33.3	1.8	375,298	2.0	57.4	59.2	38.7	1.9
24	546,194	26.4	28.5	54.5	41.5	3.6	367,438	25.7	20.8	46.3	49.8	3.6
25	535,411	27.2	25.2	51.8	43.2	4.4	365,056	26.1	18.6	44.3	50.8	4.6
26	613,661	5.6	8.6	13.9	81.6	4.4	437,824	5.2	7.0	12.1	83.8	4.0
27	584,425	2.8	69.0	72.5	26.9	1.4	391,001	2.7	63.5	66.0	32.4	1.5
28	586,038	8.8	66.5	74.9	23.3	1.4	385,010	9.1	61.4	70.3	28.0	1.5
29	500,173	19.7	52.1	71.3	25.5	2.7	306,579	20.4	42.8	63.0	33.6	3.3
30	551,127	48.3	30.8	68.6	28.7	2.3	374,773	48.6	14.2	62.5	34.8	2.4
31	415,073	9.8	14.2	23.8	72.7	3.3	437,639	9.2	11.6	20.7	76.2	3.0
32	921,005	11.0	16.7	27.5	67.1	5.3	680,938	10.1	11.0	21.2	73.9	4.7
TOTALS	18,914,657	12.8	27.0	39.6	57.0	3.3	13,319,695	12.3	22.3	34.5	62.4	3.0

STATE'S EXHIBIT 57

	CITIZENSHIP POPULATION AND PERCENT						CITIZENSHIP VOTING AGE POPULATION AND PERCENT					
DISTRICT	TOTAL	BLACK	HISPANIC	B+H	ANGLO	OTHER	TOTAL	BLACK	HISPANIC	B+H	ANGLO	OTHER
1	627,743	19.5	6.1	25.4	71.1	3.4	461,178	18.2	3.9	22.1	76.5	1.3
2	620,343	20.3	9.9	30.1	66.7	3.0	446,595	19.2	8.1	27.3	69.9	2.7
3	567,252	10.6	11.4	21.8	70.8	7.2	394,641	9.9	8.4	18.3	75.2	6.4
4	631,421	11.0	5.4	16.3	81.5	2.2	460,822	10.2	3.9	14.1	83.8	2.1
5	618,364	13.2	9.3	22.4	75.0	2.5	450,425	12.2	7.0	19.1	78.6	2.3
6	602,507	14.0	11.6	25.4	70.8	3.6	426,634	12.8	8.8	21.5	75.0	3.3
7	572,191	13.6	13.3	19.7	73.8	6.6	429,755	6.1	10.4	16.3	77.7	6.1
8	628,802	9.2	6.6	15.7	82.3	1.9	458,379	8.9	5.2	14.1	84.8	1.8
9	504,924	46.9	22.9	69.1	21.1	9.1	332,713	46.9	16.6	63.0	26.7	9.6
10	597,926	10.2	14.8	24.8	70.9	4.1	427,605	9.6	12.0	21.6	74.5	3.9
11	625,271	4.6	26.9	31.3	67.0	1.5	450,053	4.3	21.8	26.0	72.4	1.5
12	595,569	6.4	18.1	24.4	72.1	3.4	425,352	6.0	13.7	19.7	77.1	3.2
13	628,448	6.2	15.2	21.2	76.1	2.5	460,235	5.9	11.8	17.7	79.8	2.4
14	618,785	10.6	23.1	32.4	64.9	2.5	440,890	10.2	18.7	28.8	68.8	2.3
15	571,831	3.4	65.3	68.5	30.4	0.9	379,368	3.8	58.5	62.1	36.8	0.9
16	553,425	4.1	74.4	77.9	19.8	1.7	359,793	4.1	69.9	73.6	24.1	1.9
17	621,947	11.0	12.6	23.4	74.4	2.0	460,987	10.0	9.8	19.7	78.2	1.9
18	556,938	47.6	26.1	73.2	22.7	3.6	381,059	48.6	19.7	67.9	27.9	3.7
19	630,906	6.0	27.4	33.2	65.0	1.6	457,038	5.4	22.9	28.2	70.2	1.5
20	601,741	7.9	65.0	72.3	24.8	2.3	419,668	7.6	60.8	68.1	29.3	2.4
21	626,158	4.4	16.9	21.1	74.9	3.8	471,174	3.9	14.8	18.6	77.7	3.7
22	604,434	10.4	17.7	27.8	64.3	7.7	421,843	9.9	15.1	24.9	67.9	7.2
23	592,263	2.0	51.5	53.4	44.5	2.0	407,130	2.1	45.8	47.7	50.0	2.1
24	586,175	10.9	13.8	24.5	69.5	5.8	419,363	9.9	10.8	20.6	74.2	5.1
25	537,799	9.4	62.9	71.9	26.1	1.6	358,683	9.9	55.0	64.6	33.2	1.9
26	613,004	16.8	10.5	27.0	69.6	3.1	431,316	15.8	7.8	23.5	73.4	2.9
27	591,350	3.1	65.4	68.2	30.3	1.5	398,328	3.0	60.4	63.2	35.1	1.6
28	601,156	6.9	61.6	68.2	30.3	1.4	404,341	7.2	56.2	63.2	35.2	1.5
29	496,177	13.3	56.4	69.3	28.3	2.0	302,401	13.8	46.7	60.3	37.1	2.2
30	545,261	50.1	22.5	72.2	25.7	1.6	369,225	50.4	15.5	65.7	32.3	1.7
31	629,264	14.2	14.5	28.2	67.7	3.6	444,914	13.0	12.0	24.8	71.5	3.4
32	511,285	9.5	24.3	33.7	62.2	3.9	367,784	9.0	16.1	24.9	71.0	3.9
TOTALS	18,914,657	12.8	27.0	39.6	57.0	3.1	13,319,695	12.3	22.3	34.5	62.4	3.0

STATE'S EXHIBIT 58

Supreme Court, U.S.
FILED
DEC 22 2005
OFFICE OF THE CLERK

No. 05-254

In Th:

Supreme Court of the United States

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

vs.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF APPELLEE FRENCHIE HENDERSON IN SUPPORT OF APPELLANT TRAVIS COUNTY, ET AL.

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December 23, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTION PRESENTED

Does the Texas legislature's 2003 replacement of a legally valid congressional redistricting plan with a statewide plan, enacted for the "single-minded purpose" of gaining partisan advantage, satisfy the stringent constitutional rule of equipopulous districts by relying on the 2000 decennial census and the fiction of inter-censal population accuracy?

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Any "reasonably conceived plan" adopted by a State legislature to alter valid congressional districts must be supported by a legitimate and neutral regulatory purpose that takes into account, and is justified by, shifts or growth in population unaccounted for since congressional districts have last been established.	
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BRIEF OF APPELLEE FRENCHIE HENDERSON IN SUPPORT OF APPELLANT TRAVIS COUNTY, *et al.*

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW Frenchie Henderson, Appellee in the above captioned and numbered cause and, pursuant to Rules 18.2 and 24.2 of the Rules of the Supreme Court of the United States, files this Brief in Support of Appellant Travis County, *et al.*, and in this connection would respectfully show unto the Court as follows:

INTEREST OF APPELLEE HENDERSON

Appellee Frenchie Henderson (hereinafter "Appellee") is a registered voter and resident of Cherokee County, Texas; he was one of the three "Cherokee County Plaintiffs" who originally filed the suit out of which the Appellants' consolidated cases arise; and he was a plaintiff-party to the proceeding in the District Court below, whose judgment is being reviewed.[1] The Appellee's jurisdictional statement in *Henderson v. Perry*, No. 04-10649, remains pending before this Court, and presumably will remain pending until the final disposition of the consolidated cases upon which the Court has granted review.

The Appellee's purpose in submitting this brief is to present, in support of Appellant Travis County, *et al.* (hereinafter "Appellants"), historical research on the original intent of the Framers of the Federal Constitution

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[1] *Henderson v. Perry*, No. 2:03-CV-354 (E.D. Tex., June 9, 2005).

which he has acquired over the past two years in this litigation, and which Appellants may not be in a position to fully brief. The Appellee's arguments here, as below, avoid the "how much is too much" partisanship problem encountered by this Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004); and instead, Appellee's arguments, as they have since the filing of his case,[2] focus more directly on the distinct unconstitutionality of multiple intra-census congressional redistricting under the Elections Clause, which Appellee views to be fairly included in the Question Presented by Appellant Travis County.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 17 of the Pennsylvania Constitution of 1776 provides in relevant part:

> "[A]s representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the laws of the land; therefore the general assembly shall cause complete lists of the taxable inhabitants in the city and each county in the commonwealth respectively, to be taken and returned to them . . . who shall appoint a representation to each, in proportion to the number of taxable inhabitants

[2] *See id., Plaintiffs' Response in Opp. To State's Motion to Dismiss*, 5 (November 17, 2003) (Doc. 64) ("there is an analytical difference between an Equal Protection claim that alleges the State has used *power that it does possess* in a unconstitutionally discriminatory way, and an Elections Clause claim that alleges the State *does not have constitutional power* to undertake certain actions in the absence of a legitimate governmental purpose.") (italics in original).

> in such returns; which representation shall continue for the next seven years afterwards at the end of which, a new return of the taxable inhabitants shall be made, and a representation agreeable thereto appointed by the said assembly, and so on septennially forever."

Article V of the New York Constitution of 1777 provides in relevant part:

> "[A]s soon after the expiration of seven years (subsequent to the termination of the present war) as may be[,] a census of the electors and inhabitants in this State [shall] be taken, under the direction of the legislature. And if, on such census, it shall appear that the number of representatives in assembly from the said counties is not justly proportioned to the number of electors in the said counties respectively, that the legislature do adjust and apportion the same by that rule. And further, that once in ever [sic] seven years, after the taking of the said first census, a just account of the electors resident in each county shall be taken, and if it shall thereupon appear that the number of electors in any county shall have increased or diminished one or more seventieth parts of the whole number of electors, which, on the said first census, shall be found in this State, the number of representatives for such county shall be increased or diminished accordingly, that is to say, one representative for every seventieth part as aforesaid."

Article XII of the New York Constitution of 1777 provides in relevant part:

> "[B]e it ordained, that a census shall be taken, as soon as may be after the expiration of seven years from the termination of the present war,

> under the direction of the legislature; and if, on such census, it shall appear that the number of senators is not justly proportioned to the several districts, that the legislature adjust the proportion, as near as may be, to the number of freeholders, qualified as aforesaid, in each district."

SUMMARY OF ARGUMENT

The District Court's decision rests on the erroneous (and sweepingly overbroad) assumption that "[u]nless and until Congress chooses to act, the states' power to redistrict remains unlimited by constitutional text." *Session v. Perry*, 298 F.Supp.2d 451, 459 (E.D. Tex. 2004), *vacated and remanded sub. nom. Henderson v. Perry*, No. 03-9644, __ U.S. ___, 125 S.Ct. 351 (Oct. 18, 2004). This extraordinary judicial promulgation and delegation of unprecedented power to State legislatures, untethered by any requirement of a legitimate regulatory purpose, invites if it does not guarantee Nationwide electoral turmoil, electoral instability, and a denial of meaningful representation in the United States Congress to millions of American voters, including Appellee and his rural East Texas neighbors.

Once valid districts are established after a federal apportionment, no residual constitutional power remains vested in a State legislature to authorize alteration of congressional districts *in the absence of a neutral, legitimate regulatory purpose*. In support of this conclusion, Appellee would draw this Court's attention to (as set out in greater detail herein):

1) A comparison of the Elections Clause with contemporaneous State constitutional provisions in effect at the time the Elections Clause was

adopted, on which the Framers purported to model the Constitution;

2) Evidence of the usage of the Elections Clause power by the several State legislatures during the first decade of the Republic;

3) An editorial published in the *New-York Herald* on April 27, 1808, that reflects the contemporary understanding of the temporal scope of redistricting power under the Elections Clause; and

4) An insightful legal opinion and analysis written by renowned jurist Chancellor James Kent, delivered by Kent while Chief Justice of the New York Council of Revision in 1809, that addresses multiple intra-census electoral redistricting, and construes a redistricting provision on which the Elections Clause was modeled.

Regulation of congressional districts by a State legislature, like revision of State legislative districts, must be undertaken pursuant to a "reasonably conceived plan for periodic readjustment of legislative representation".[3] The intent of the Framers was that *population* would govern any prescription or alteration of congressional election districts;[4] and it is settled law that the "basic aim" of the Framers under the Elections Clause was to ensure "fair and effective representation for all citizens."[5]

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[3] *Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

[4] *Wesberry v. Sanders*, 376 U.S. 1, 8-9 (1964) ("[T]hose who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.").

[5] *Vieth v. Jubelirer*, supra, 541 U.S. at 307 (Kennedy, J., concurring in judgment) (italics added), *quoting Reynolds v. Sims*, supra, 377 U.S.

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While the foregoing guidelines generally shape the outer contours of the power delegated to State legislatures by the Elections Clause, other equally important but more specific countervailing factors must be considered when defining the power delegated. This Court, for example, has held that "[l]imitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system".[6] A fair expression of this "need for stability and continuity", against which any exercise of Elections Clause power must be balanced, appropriately includes recognition that representational harm to some voters necessarily results from any substantial alteration of congressional districts; and that "[i]ntelligent voters, regardless of party affiliation" reasonably "resent . . . political manipulation of the electorate for no public purpose".[7] As the Appellee will show, the Framers of the Federal Constitution weighed these considerations when adopting the Census and Election Clauses.

With these factors in mind, Appellee argues that absent a demonstration of exigent or extraordinary circumstances, any "reasonably conceived plan" adopted by a State legislature to alter valid congressional districts implemented by a federal court in a final judgment, must be supported by a legitimate and neutral regulatory

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at 565-566; *Vieth v. Jubelirer*, supra, 541 U.S. at 320 (Stevens, J., dissenting) (same); *id.*, 541 U.S. at 343 (Souter, joined by Ginsburg, JJ., dissenting) (same).

[6] *Reynolds v. Sims*, supra, 377 U.S. at 583.

[7] *Vieth v. Jubelirer*, supra, 541 U.S. at 322 n. 6 (Stevens, J., dissenting), *quoting Davis v. Bandemer*, 478 U.S. 109, 177 (1986) (Powell, J., concurring in part and dissenting in part).

purpose that takes into account, and is justified by, shifts or growth in population unaccounted for since congressional districts have last been established.

ARGUMENT

The District Court concluded that because the Elections Clause does not *constitutionally require* promulgation of congressional districts, it "presumably . . . never entered the Framers' minds" that the Elections Clause would in any manner limit the frequency of congressional redistricting by the States after each federal decennial census. *Session v. Perry*, supra, 298 F.Supp.2d at 460. The District Court's analysis, in this regard, is fundamentally flawed in at least four critical respects. First, the District Court's "presumption" (about what "never entered the Framers' minds") is predicated solely on its passing observation that there is no explicit districting requirement in the Elections Clause. To this extent, the District Court's analysis conflicts with *Wesberry v. Sanders*, supra, 376 U.S. at 7 (construing Article I, Section 2 "in its historical context"); for if absence of any explicit districting requirement in the Elections Clause, without resort to "historical context", were determinative of the question presented by Appellants, then it would likewise be true that no constitutional prohibition against nonequipopulous congressional districts could exist, as the literal terms of Article I do not textually require elections by districts, much less by equipopulous districts. Second, the District Court's "presumption" (about what "never entered the Framers' minds") is flawed not only by its disregard of substantial contemporaneous evidence that the Framers assumed congressional districts (and not only "general

ticket" regulations) would be established by the States; but also by its failure to recognize the existence of colonial era regulations that did, in fact, contain temporal restrictions on the frequency of electoral redistricting at the time the Elections Clause was framed. Third, the District Court's decision wholly failed to take into account the behavior of the State legislatures during the first decade after the first federal enumeration and apportionment, which discloses that among the States *that used population* to govern their representation, none engaged in multiple intra-decennial congressional redistricting in the absence of a neutral regulatory purpose, *i.e.*, without justification of an intervening census conducted under State law demonstrating the need to adjust representation. Fourth, and finally, the District Court's conclusion directly conflicts with contemporaneous evidence which discloses that, at least as early as the second federal census and apportionment, the general electorate (and at least one governing body) understood multiple intra-census redistricting, in the absence of a legitimate regulatory purpose, to be constitutionally prohibited.

I. Comparison of the Elections Clause with Contemporaneous State Constitutional Provisions in Effect at the Time the Elections Clause was Adopted, on which the Framers Purported to Model the Constitution.

The record of debate at the Federal Constitutional Convention of 1787, as well as the debates at the several State ratification conventions, signals awareness on the part of the Framers that the manner of electing representatives

to the National Legislature would in most States involve elections by districts.[8] The fact that some States after ratification of the Elections Clause chose initially to adopt the "general ticket" system to regulate congressional elections, *Session v. Perry*, supra, 298 F.Supp.2d at 460; says nothing about whether the Framers expected the Elections Clause to limit the frequency of redistricting when States chose to enact, as they had previously, districting regulations for holding their elections.

When drafting the Federal Constitution, the Framers sought "[t]o use simple and precise language, and general propositions, *according to the example of the (several) constitutions of the several states*,"[9] and this Court in the past has properly looked to these State constitutions, adopted during the "Founding Decade" (1776-1786), to interpret analogous provisions of the Federal Constitution.[10] At the time of the Federal Convention in 1787, at

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[8] *E.g.*, 3 *The Records of the Federal Convention of 1787*, 110 (Farrand ed. 1911) (hereinafter "*Farrand*") (C. Pickney pamphlet, May 28, 1787) ("The districts, into which the Union are to be divided, will be apportioned, as to give each its due weight."); 1 *Farrand*, 48-49 (George Mason, May 31, 1787) (House of Representatives should be elected "from different districts" to reflect the "views arising from difference of produce, of habits, &c. &c."); 1 *Farrand*, 132-133 (Elbridge Gerry, June 6, 1787) ("[t]he people should nominate persons in certain districts"); 1 *Farrand*, 134 (George Mason, June 6, 1787) ("there [is] a better chance for proper elections by the people, if divided into larger districts, than by the State Legislatures"); 1 *Farrand*, 179-180 (James Wilson, June 9, 1787) ("Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."); and, 1 *Farrand*, 300 (Alexander Hamilton, June 18, 1787) (proposing that House of Representatives be elected "by the people in districts").

[9] Committee of the Detail, 2 *Farrand* at 137 (italics added).

[10] A summary of the influences that early state constitutions had on the framing of the Federal Constitution in 1787 appears in *Williams*,

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least nine of the thirteen original colonies had already enacted their own State constitutions.[11] All nine of these had provided for election to State legislative offices by territorial subdivisions of their respective States, *i.e.*, by towns, counties, parishes or districts.[12] Three of these nine colonies, Pennsylvania, New York, and South Carolina, had constitutions that provided for the return of a census or enumeration of their populations to govern, in whole or in part, their electoral representation.[13] Section 17 of the Pennsylvania Constitution of 1776 required an enumeration of "taxable inhabitants" of that commonwealth; provided for districts consisting of "the City of Philadelphia and each county of the commonwealth"; and ordained proportional "representation to each . . . which representation shall

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The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and its Influence on American Constitutionalism, 62 Temp.L.Rev. 541, 542-544 (Spring-Summer 1989) (hereinafter "*Williams*").

[11] These colonies were Pennsylvania (1776), 5 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws*, 3081 (1909) (hereinafter "*Thorpe*"); New Jersey (1776), 5 *Thorpe*, 2594; Massachusetts (1780), 3 *Thorpe*, 1888; Maryland (1776), 3 *Thorpe*, 1686; South Carolina (1778), 6 *Thorpe*, 3248; New Hampshire (1784), 4 *Thorpe*, 2453; New York (1777), 5 *Thorpe*, 2623; North Carolina (1776), 5 *Thorpe*, 2787; and Georgia (1777), 2 *Thorpe*, 777.

[12] Pa.Const., Section 17 (1776) (district and counties), 5 *Thorpe*, 3086; N.J.Const., Art. III (1776) (counties), 5 *Thorpe*, 2595; Mass.Const., Part II, ch. I, sec. II, Art. II (1780) (towns and districts), 3 *Thorpe*, 1895; Md.Const., Art. III (1776) (counties), 3 *Thorpe*, 1691; S.C.Const., Art. XII and XIII (1778) (parishes and districts), 6 *Thorpe*, 3250-51; N.H.Const., Part II (1784) (districts), 4 *Thorpe*, 2459; N.Y.Const., Art. IV, V, and VIII (1777) (counties and districts), 5 *Thorpe* 2629-30; N.C.Const., Art. III (1776) (counties and towns), 5 *Thorpe*, 2790; and Ga.Const., Art. IV (1777) (counties), 2 *Thorpe*, 778.

[13] Pa.Const., Section 17 (1776), 5 *Thorpe*, 3086; N.Y.Const., Art. V and XII (1777), 5 *Thorpe*, 2630-31; and S.C.Const., Art. XV (1778), 6 *Thorpe*, 3252.

continue for the next seven years afterwards at the end of which, a new return of the taxable inhabitants shall be made, and a representation agreeable thereto appointed by the said Assembly, and so on septennially forever."[14] Article V of the New York Constitution of 1777 provided that a census be taken "once ever [sic] seven years", and that "if it shall thereupon appear that the number of electors in any county shall have increased or diminished.... the number of representatives for such county shall be increased or diminished accordingly."[15]

While the State Constitutions of both Pennsylvania and New York, like the Federal Constitution of 1787 that would follow, recognized that population alone (unaffected by considerations of property) would govern representation in their respective House of Representatives; the South Carolina Constitution of 1778, in contrast, allowed consideration of both population and property assessments, and provided that "at the expiration of seven years after the passing of this constitution, and at the end of every fourteen years thereafter, the representation of the whole State shall be proportioned in the most equal and just manner according to the particular and comparative strength *and* taxable property of the different parts of the same, regard being always had to the number of white inhabitants *and* such taxable property."[16] Thus, only the

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[14] 5 *Thorpe*, 3086.

[15] 5 *Thorpe*, 2629-2630. Article XII of the same constitution similarly provided that a census be taken "once every seven years," and that the State Legislature "adjust the proportion," "as near as may be," whenever "on such census" it appeared that the senatorial districts were "not justly apportioned". 5 *Thorpe*, 2631.

[16] S.C.Const. of 1778, Article XV, 6 *Thorpe*, 3252 (italics added).

States of Pennsylvania and New York, prior to ratification of the Federal Constitution in 1788, relied, in their respective State constitutions, exclusively on population to govern electoral representation. On the basis of this distinction, scholars have concluded that the Pennsylvania and New York State Constitutions provided the model for federal representation in the U.S. House of Representatives.[17]

The concept adopted in Section 17 of the Pennsylvania Constitution of 1776, *i.e.*, that representative districts would be governed solely by population, and that districts, once established, "shall continue for the next seven years" (until the taking of a subsequent census), was a topic of contemporaneous public discussion in Philadelphia at the time Section 17 was framed.[18] Only weeks earlier Thomas Paine had published at Philadelphia his *Four Letters on Interesting Subjects*; and in the last of these letters, while

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[17] *E.g.*, Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions*, 109 (LSU Press 1980) ("Section 2 of Article I in the United States Constitution has its origin in the provisions first found in the Pennsylvania and New York constitutions."); *Williams*, supra, 62 Temp.L.Rev. at 579 (Article I, Section 2 "was clearly patterned on state provisions like Pennsylvania's" Section 17); Robinson, *The Original and Derived Features of the Constitution*, 1 Annals Am. Acad. Pol. & Soc. Sci. 203, 213 (1890-1891) ("The constitution of New York is a particularly striking precedent, in that it provided for a readjustment of the representation after a periodic *census*.") (italics in original). When writing "To the People of New York" in *The Federalist* No. 1, Hamilton reassured his readers that the Federal Constitution was "analogous" to the New York Constitution of 1777. (Oct. 27, 1787).

[18] The Pennsylvania State Constitutional Convention of 1776, at which Benjamin Franklin was unanimously elected Presiding Officer, met at Philadelphia from July 15 to September 29, 1776. *Selsam, The Pennsylvania Constitution of 1776*, 147, 163-164 (New York, Octagon reprint 1971) (hereinafter "*Selsam*").

outlining his proposals for the new Pennsylvania Constitution, Paine had written that:

> "A CONSTITUTION should lay down some permanent ratio, by which the representation should afterwards encrease [sic] or decrease with the number of inhabitants; for the right of representation, which is a natural one, *ought not to depend upon the will and pleasure of future legislatures.*"[19]

Thomas Paine's proposal that alterations of representation should not afterwards "depend on the will and pleasure of future legislatures," but instead only upon "encreases or decreases" in population, was a reform directed at widely recognized political abuses under the proprietary charter of William Penn. Although political representation in Pennsylvania under William Penn had initially been more egalitarian than under other provincial charters,[20] over time the Pennsylvania Assembly had come under the aristocratic control of mercantile factions among Pennsylvania's eastern inhabitants. By 1776, as Justice Scalia has noted, the loyalist colonial Pennsylvania Assembly had resorted to various means to entrench its hold on power, and to deny fair representation to Pennsylvania's rural western inhabitants and the laborers and

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[19] *Four Letters on Intersting Subjects* (Styner & Cist, Philadelphia) (May 22 – July 2, 1776), *reprinted in* Wood, *Common Sense and Other Writings*, 57, 78 (Random House, 2003) (italics added). The first scholar to recognize Paine as the author of these letters has characterized this quoted passage as akin to Paine's earlier "protest[s] against the 'undue authority' which the Pennsylvania Assembly obtained over the delegates to the Continental Congress." *See* Aldridge, *Thomas Paine's Ideology*, 235 (1984).

[20] *Selsam*, supra, 8.

mechanics residing in more urban Philadelphia.[21] Given the contemporaneous evidence of the prevailing resentment in Pennsylvania against property qualifications for suffrage and representation unequal to population, and the evident hostility in 1776 among the disfranchised in Pennsylvania to the prospect of future electoral regulation motivated by partisan purpose,[22] it is apparent that the Framers of Pennsylvania's Constitution of 1776, when adopting Section 17, sought by permanent constitutional regulation to prevent "future legislatures" from altering representation for reasons not related to "encreases or decreases" in population.

On September 5, 1776, the Pennsylvania State constitutional convention ordered that a draft of its proposed constitution be published in a pamphlet for public consideration; and this draft was thereafter printed in both pamphlet form and in local newspapers inviting public comment.[23] As originally resolved by the convention "after

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[21] *Selsam*, 2-3, 31-34. *See also, Vieth v. Jubelirer*, supra, 541 U.S. at 274 (plurality opinion per Scalia, J.) ("at the beginning of the 18th century . . . several counties [in colonial Pennsylvania] conspired to minimize the political power of the city of Philadelphia by refusing to allow it to merge or expand into surrounding jurisdictions, and denying it additional representatives"), citing *Griffith, The Rise and Development of the Gerrymander*, 26-28 (Arno Press reprint, 1971) (hereinafter "*Griffith*").

[22] The call for a new Pennsylvania State constitution was precipitated by the unanimous vote of "[b]etween four and five thousand people assembled, in spite of the rain," at the Pennsylvania State House (now Independence Hall) on May 20, 1776. One written complaint of these demonstrators was that the sitting Assembly through electoral manipulation had conducted elections "to the Exclusion of many worthy inhabitants." *Selsam*, 118-119.

[23] *Shaeffer, Public Consideration of the 1776 Pennsylvania Constitution*, 98 Pa. Mag. Hist. & Biog. 415, 419 (1974) (hereinafter "*Shaeffer*"). A

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considerable debate," the first draft of Section 17 provided for electoral districts; but voting under this original proposal was to be regulated "in one general ticket out of the County at large," and no mention of an enumeration or census to ensure equal representation was included.[24] In response to the publication of this proposal, an anonymous writer, identifying himself under the pseudonym "Demophilus," timely objected to elections by general ticket and, alluding to his own recently published pamphlet, *The Genuine Principles of the Ancient Saxon, or English Constitution*, observed that "[w]hen candidates are all put up together in a county ticket, they are to be considered the favorites of a junto."[25] There were also, however, certain objections to elections by districts based on equal population, of which the Framers of the Pennsylvania constitution would have been aware. These objections were summarized in a pamphlet, also published in 1776, entitled *The People the Best Governors: Or a Plan of Government Founded on the Just Principles of Natural*

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copy of this pamphlet, contemporaneously published by Henry Miller in 1776, is available on microform, *Early American Imprints*, First Series, No. 14993 (Readex Microprint, 1985). The edition of the *Pennsylvania Evening Post* published on September 10, 1776, wherein this draft first appeared in newspaper form, can be found in *Early American Newspapers*, First Series (microfilm). All early newspapers cited hereinafter are likewise available in the latter source.

[24] *Shaeffer*, supra, 98 Pa. Mag. Hist. & Biog. at 425.

[25] *Pennsylvania Packet*, 2 (Sept. 17, 1776), *citing* "The ancient Saxon or English Constitution published by Mr. R. Bell," the latter of which is reprinted in 1 *Hyneman & Lutz, American Political Writing During the Founding Era*, 340 (1983) (hereinafter "*Hyneman*").

Freedom.[26] In this pamphlet an anonymous dissenter observed that:

> "[T]o have a state represented adequately under this plan [in which representation is "determined entirely according to the number of inhabitants"], would puzzle the brain of a philosopher. Indeed, to effect it some townships must be cut to pieces, others tacked together – and, at best, many parts would remain defective. And, if we look into this matter critically, we shall find it still more egregious. It is an old observation, the *political bodies should be immortal* – a government is not founded for a day or a year, and, for that reason, should be erected upon some invariable principles. Grant, for a moment, that the number of people is the only measure of representation; as often then, as the former increases or diminishes, the latter must of consequence; as often, as the inhabitants in a state vary their situation, the weight of legislation changes; and, accordingly, the balance of power is subject to continual, and frequently unforseen alterations. Turn which way we will upon this plan, we shall find unsurmountable difficulties: So that those, who have adopted this measure, are either too short-sighted, to see the future interests of society, or so secret and designing, as to take the advantage of such undeterminate principles."[27]

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[26] *Reprinted* in *Hyneman*, supra, at 390. Although Hynemen has attributed this pamphlet to a resident of New Hampshire, neither its author nor the place of its original publication are known. *Cushing, The People the Best Governors*, 1 Am. Hist. Rev. 284, 285 (1895-1896).

[27] *Hyneman*, supra, 395. Perhaps coincidentally, the Pennsylvania State Convention of 1776 "could boast of possession, among [its] members, two philosophers, Franklin and Rittenhouse." *Barton, Memoirs*

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Viewed in the historical context of the foregoing writings, the purposes of the final version of Section 17 of the Pennsylvania Constitution, as adopted on September 28, 1776, become clear. By providing that electoral districts, once established on the basis of an enumeration, would thereafter "continue for the next seven years" until the taking of a subsequent census, Section 17 was plainly intended not only to respond to the published objections of "Demophilus" and his insistence that elections for representatives be by districts (to the extent that the City of Philadelphia and the remainder of Philadelphia County were provided with separate representation), but also to solve the "puzzle" (and overcome the "unsurmountable difficulties") attendant to the principle of equal representation based on equal population. Most relevant to the present case however, is that Section 17 also appears to have been designed to remove the risk, identified in the last quoted pamphlet, of electoral manipulation by "secret and designing" individuals who might attempt to "take advantage" of "indeterminate principles." Consistent with this understanding, another anonymous pamphleteer, writing a short time later in Boston under the pseudonym "Equal Representation," advocated adopting Paine's constitutional proposal, in the State of Massachusetts, stating that: "To preserve this representation equal, thro' all ages and changes of time, taking warning from the unequal representation of Britain ... [l]et it be agreed ... [to] renew this proportion of representatives by the valuation,

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of the Life of David Rittenhouse, 262 (1813) (*Early American Imprints*, 2d Series, No. 27835) (microform).

once in ten or fifteen years, to preserve an equality *to the latest period.*"[28]

The redistricting practices of Pennsylvania prior to adoption of the new *federal* constitution at Philadelphia on September 17, 1787, which would have provided the Framers with an important "example" of how the new federal Elections Clause would operate,[29] disclose that it was only a change in population, as demonstrated by the taking of a new census, that would authorize alteration of election districts. On September 13, 1785, the Pennsylvania Assembly under its new State constitution enacted legislation that required its existing Assembly districts (previously enacted on September 24, 1779) to remain unaltered "until a new proportion of representation in the legislature shall be ascertained and appointed" according "to the number of taxable inhabitants with in [sic] each city and county."[30] Thereafter, on March 3, 1786, the Pennsylvania Assembly passed a census act "to ascertain the number of taxable inhabitants within the city of Philadelphia, and within each of the counties of th[e] commonwealth."[31] On September 27, 1786, after reiterating its explicit constitutional declaration that "representation in

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[28] *The Continental Journal and Weekly Advertiser*, 2 (Boston, Jan. 15, 1778) (italics added). The "unequal representation of Britain" referenced by this author obviously refers to the "rotten boroughs" later objected to at the Federal Convention by, among others, James Wilson of Pennsylvania. *Wesberry v. Sanders*, supra, 376 U.S. at 14-15.

[29] *Williams*, supra, 62 Temp.L.Rev., at 579 ("Because the Continental Congress met in Philadelphia, delegates were aware of the Pennsylvania Constitution" of 1776).

[30] Laws of Pennsylvania, 9th Session, ch. CCXXI, Section 4 (Library of Congress, Microform).

[31] Laws of Pennsylvania, 10th Session, ch. CCLI.

proportion to the number of taxable inhabitants is the only principle which can at all times secure equal liberty," the Pennsylvania Assembly enacted new legislative districts "in pursuance of" the returns of the foregoing census.[32] The districts so enacted were ordained to thereafter remain in effect "for the ensuing seven years," and "during each of the said seven years," according to "the true intent and meaning" of the Pennsylvania constitution.[33]

II. Usage of the Elections Clause Power by the Several State Legislatures During the First Decade of the Republic.

The behavior of the original thirteen States immediately after the first federal enumeration and apportionment reinforces the notion that the Elections Clause was understood to authorize congressional redistricting *only once* after each federal apportionment unless justified by a legitimate regulatory purpose (*i.e.*, to respond to a *quantified* shift or growth in population). Excluding Delaware and Rhode Island, which under the Constitutional apportionment were entitled to only one Representative each,[34] seven of the remaining eleven original States elected their Representatives to the First Congress by districts.[35]

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[32] Laws of Pennsylvania, 10th Session, ch. CCCII, Section I.

[33] *Id.*, Preamble and Section II.

[34] U.S.Const., Article I, Section 2.

[35] *Martis, The Historical Atlas of United States Congressional Districts*, 8 (1982) (hereinafter "*Martis*"). States electing Representatives to the First Congress by congressional districts were Georgia, Maryland, Massachusetts, New York, North Carolina, South Carolina, and Virginia, while the States of Connecticut, New Hampshire, New Jersey and Pennsylvania elected their Representatives by "general ticket." *Ibid.*

Between the first federal apportionment act of April 14, 1792,[36] and the second apportionment act of January 14, 1802,[37] only three of these States, Pennsylvania, New York, and Massachusetts, enacted multiple congressional redistricting statutes. As explained below, in both New York and Pennsylvania, wherein population enumerations had previously been used to govern representation, a neutral regulatory purpose or justification existed for each revision of districts. In the third State, Massachusetts, the reason for redistricting, while unconstitutional under present jurisprudence, would still have presented a more legitimate regulatory purpose than that presented by the State of Texas in the present case.

Intervening septennial censuses were conducted under State law in both New York and Pennsylvania after their initial redistricting following the first federal decennial census, and before their subsequent intra-decennial revisions of congressional districts. New York enacted its first congressional districting law, after the first federal apportionment, on December 18, 1792.[38] This statute provided (in its ultimate paragraph) that "this act shall continue in force, until a future census of the inhabitants of this State shall be taken, by virtue of the constitution of this State, or by any law of the legislature thereof, or of the Congress of the United States of America."[39] On March 3, 1795, the New York Assembly passed legislation to require the taking of a new census, and the returns for

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[36] 1 Stat. 253, ch. 23 (1792).

[37] 2 Stat. 128, ch. 1 (1802).

[38] Laws of New York, Sixteenth Session, ch. 5 (Library of Congress, Microform); *Martis*, supra, 247.

[39] Laws of New York, Sixteenth Session, ch. 5.

this census were reported back to the Assembly, in accordance with state law, on January 20, 1796.[40] Thereafter, on March 28, 1797, new congressional districts were enacted.[41] Finally, on February 28, 1800, the Sixth Congress passed the second Census Act, which directed that an enumeration of the inhabitants of the United States be taken, to commence "on the first Monday of August next [August 7, 1800]."[42] At the next session of its legislature, on March 24, 1801, New York enacted new congressional districts on the basis of returns received from this federal census.[43]

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[40] Laws of New York, Eighteenth Session, ch. 11; Journal of the Assembly of the State of New York, Nineteenth Session, 30-33 (hereinafter "*New York Assembly Journal*") (available online with subscription at "Eighteenth Century Collections Online").

[41] Laws of New York, Twentieth Session, ch. 62.

[42] 2 Stat. 11, ch. 12 (1800).

[43] Laws of New York, Twenty-Fourth Session, ch. 64. The federal Census Act at this time required that a "schedule containing the number of inhabitants of [a] district . . . be set up at two of the most public places" by the deputized enumerators or assistants in each district, and "there to remain for the inspection of all concerned." 2 Stat. 11, ch. 12, Section 7 (1800). It appears that under this regime State officials found publication of federal census returns, prior to a new federal apportionment, sufficient to warrant revision of electoral districts. *See, Cahill v. Leopold*, 103 A. 2d 818, 824 n. 7 (Conn. 1954). Completed census returns for some districts in New York were reported little more than a month after enumeration had commenced, *see e.g.*, *New-York Commercial Advertiser*, at 3 (Monday, Sept. 8, 1800) (noting an "increase of 1,437 inhabitants in ten years" in the Town of Portland, N.Y., under "[t]he new census of the United States"); *id.*, at 3 (Monday, Oct. 13, 1800) (noting population increase in Town of Newburyport, N.Y, as shown by the new federal census). Notably, for reasons to be explained shortly, this particular legislative revision of congressional districts in 1801 was recommended by James Kent, then Associate Justice of the New York Supreme Court who, along with Associate Justice Jacob Radcliff, had been assigned the task of suggesting

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The congressional redistricting practices in Pennsylvania during this period followed the pattern found in New York. A septennial census was conducted in Pennsylvania from June to October of 1793, pursuant to an Act passed by the Pennsylvania Assembly on April 10, 1793.[44] Pennsylvania thereafter enacted its first congressional districting law after the first federal apportionment, along with new State legislative districts, on April 22, 1794.[45] Under these two Acts, Pennsylvania's state legislative districts were to remain unaltered "until the next enumeration of the taxable inhabitants, and an apportionment thereon"; and the *congressional* districts so enacted were to remain unaltered "until an enumeration of the inhabitants of the United States shall be taken, agreeably to the constitution and laws of the said United States."[46]

Although one scholar, Professor Ken Martis, has reported that Pennsylvania enacted new congressional districts on March 12, 1800 (before the next federal census and apportionment);[47] close examination of the statute cited by Professor Martis discloses that it was only the creation of several new counties, not electoral redistricting, that was intended.[48] This statute provided that most if not all of the effected counties, new and old, would "continue

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comprehensive revisions to the statutes of the State of New York. *New York Assembly Journal*, Twenty-fourth Session, 45, 53 (Feb. 5, 1801).

[44] Laws of Pennsylvania, 17th Session, ch. CLXIII, Section II.

[45] Laws of Pennsylvania, 18th Session, ch. CCL (State legislative districts); *id.*, ch. CCLVI (congressional districts).

[46] Laws of Pennsylvania, 18th Session, ch. CCL, Section IV (State legislative districts); *id.*, ch. CCLVI, Section II (congressional districts).

[47] *See Martis*, supra, 263, citing "c. 264."

[48] Laws of Pennsylvania, 24th Session, ch. CCLXIV.

to be a district for the election of senators . . . and representatives in Congress," "until an enumeration of the taxable inhabitants shall be made within the before described counties."[49] Such an enumeration had already been ordered by the Pennsylvania Assembly less than a week earlier on March 7, 1800;[50] new State legislative districts were thereafter enacted on February 27, 1801;[51] and, following the completion of the second federal census and passage of the federal apportionment act on January 14, 1802, Pennsylvania enacted new congressional districts on April 2, 1802.[52] In this last statute, the Pennsylvania Assembly once again provided that the congressional districts so enacted were to remain unaltered "until an enumeration of the inhabitants of the United States shall be taken, agreeably to the constitution and laws of the said United States."[53]

The actions of the third original State to engage in multiple congressional redistricting between the first and second federal censuses, Massachusetts, provides no support for any argument that the Elections Clause was understood to authorize such a practice. The colonial constitution of Massachusetts, like that of New Hampshire, authorized alteration of legislative districts "from time to time"; but the constitutional authority for an adjustment of representation in those colonies was not based upon population at all, but rather was contingent solely upon a change in "the proportion of the public taxes

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[49] *Id.*, ch. CCLXIV, Section XII.

[50] Laws of Pennsylvania, 24th Session, ch. CCLIII.

[51] Laws of Pennsylvania, 25th Session, ch. CCCXXVI.

[52] Laws of Pennsylvania, 26th Session, ch. LXXIII.

[53] *Id.*, ch. LXXIII, Section 2.

paid by the said districts,"[54] with the calculation and payment of taxes received from each district presumably occurring more than once every enumeration of the populous. The intra-decennial revision of congressional districts by Massachusetts thus appears to have been based on either a standing practice under its State constitution, or on a faulty and now disapproved interpretation of the Federal Constitution, or both. It is of course now settled that the Framers intended that population alone, and not property valuations, must govern representation in the U.S. House of Representatives.[55] Moreover, while alteration of congressional districts in response to an intra-decennial calculation (or payment) of taxes could not presently provide a constitutionally valid purpose to redistrict; Massachusetts' use of property valuations to govern representation assuredly provided, at this time, a more neutral justification for multiple intra-decennial redistricting than does the redistricting in the present case, which is unrelated to increases (or decreases) in either wealth, property value *or* population.

III. The Contemporaneous Understanding of the Temporal Scope of Redistricting Power under the Elections Clause.

The first obvious incident of multiple congressional redistricting between federal decennial enumerations *not* supported by any legitimate regulatory purpose (that is, unrelated to any purpose to accommodate for population shifts or growth), occurred in the State of New York in

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[54] Mass.Const. of 1780, Chapter I, Section II, Article I, 3 *Thorpe*, 1895; N.H. Const. of 1784, 4 *Thorpe*, 2459.

[55] *Wesberry v. Sanders*, supra, 376 U.S. at 8-9.

1804. This redistricting was swiftly followed by yet another alteration of congressional districts in that State in 1808.[56] Far from receiving universal acceptance as merely a lawful exercise of power under the Elections Clause however, these intra-decennial congressional redistricting enactments went neither unnoticed nor unchallenged by the electorate. In an editorial entitled "To the Electors of Members of Congress" (signed under the pseudonym "SENEX"),[57] one adversely affected observer objected that "[a]ccording to the constitution, when a new census and apportionment of representatives are made by Congress, the state legislatures should respectively *prescribe* the *manner* of their choice; and this manner, until altered by Congress, ought to remain the same till a new apportionment of representatives shall be made." *Ibid.* (italics in original). While the anonymous author of this editorial, "SENEX," noted that more frequent congressional redistricting might *arguably* be justified "as the states from time to time [might] enumerate their own inhabitants, and as thereby they m[ight] discover changes and inequalities in the districts, [and should] not [be] restrained from correcting the same by altering the districts," *ibid.*; in SENEX's view, no such alteration of valid congressional districts, as "ha[d] led to these frequent violations of the [federal] constitution" in New York in 1804 and 1808, could constitutionally be justified solely by illegitimate "motives

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[56] *See Griffith*, supra, 56-59.

[57] *The New-York Herald*, 2 (April 27, 1808). The *New-York Herald* was the semi-weekly edition of the *New-York Evening Post* founded in 1801 by Alexander Hamilton "and a group of his intimate political lieutenants." Unlike the *Evening Post*, the *Herald* from its inception was distributed "to distant subscribers from Boston to Savannah." See *Nevins, The Evening Post: A Century of Journalism*, 9, 20 (1922).

. . . [wherein] the object has been to preserve power in the hands of those who at present possess and abuse it." *Ibid.*[58]

The construction of the Elections Clause given by SENEX was met with deafening silence from those most likely to challenge SENEX's argument. A careful examination of the contemporaneous editions of the *New-York Evening Post*'s most tenacious political rival, the *New-York American Citizen* published by the "slashing and fearless" Democratic-Republican James Cheetham,[59] discloses that from Monday, April 25, 1808 (the date on which the SENEX editorial was originally published in the *Evening Post*) through at least Tuesday, May 31, 1808, there is not a single published assertion by either Cheetham, or any contributor to his political news journal, that disputes SENEX's interpretation of the Elections Clause.[60] This striking non-response stands in stark contrast to Cheetham's daily diatribes that specifically challenged virtually every other editorial published by the *Evening Post*.[61] There is no possibility that SENEX's twice published

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[58] The complete text of the SENEX editorial, along with a description of the notable personages evidently associated with its publication (including Rufus King, John Jay, James Kent and Gouverneur Morris), appears in *Plaintiff Henderson's Revised Supplemental Brief on Remand*, No. 2:03-CV-354 (E.D. Tex.) (Doc. 264-2) (filed June 2, 2005).

[59] *Nevins*, supra, at 12.

[60] As in the case of the *New-York Evening Post*, the *American Citizen* for these dates is available on microfilm (Early American Newspapers) (Film No. 26, 131; Reel 152; part 7), at the Perry-Castenda Library, University of Texas at Austin, in addition to the Library of Congress.

[61] *See e.g.*, *The American Citizen* (April 25, 1808) (Cheetham editorial replying to "some quibbles unworthy of notice [made by "Coleman," the *Evening Post*'s editor] . . . in reference to Mr. [Gurdon Saltonstall] Mumford," an incumbent Democratic-Republican Congressman from New York; *id.* (April 29, 1808) (Cheetham editorial

(Continued on following page)

editorial escaped the notice of Cheetham, his readers and literary contributors. The Appellee therefore finds it telling that the State of Texas herein now attempts to invoke a legal argument that either never occurred to, or was deemed too feeble to be raised by, the outspoken political activists in Cheetham's party who were alive and, no doubt, politically conscious when the Elections Clause was debated and ratified.

IV. Chancellor James Kent's View on Multiple Intra-Census Electoral Redistricting, Given When Construing a Redistricting Provision on which the Elections Clause was Modeled.

The assertion made by SENEX – that multiple redistricting between enumerations violates the constitutionally protected rights of voters, was not a view that was limited, during the earliest years of the Nation, to the general populace. Less than a year after the foregoing protest by SENEX, the New York Council of Revision, in a decision reported by renowned Chief Justice (and later Chancellor) James Kent, construed Article IV of the New York Constitution, as amended in 1801, to prohibit multiple alteration of state senate districts after each census.[62]

In 1807, the State of New York had conducted a census pursuant to Article V of the Constitution of 1777,

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providing "[a]n answer to 'the Friend of Justice' published in the *New-York Evening Post* of the 27th instant.").

[62] Other than *compelling* legislative action after each census, Article IV of the New York Constitution, as amended in 1801, adhered to the post-census apportionment and redistricting provisions contained in Articles V and XII of the New York Constitution of 1777. 5 *Thorpe* 2629-2631, 2639.

which, like the Pennsylvania Constitution, provided that a census be taken every seven years.[63] On April 1, 1808, the New York legislature enacted new legislative districts utilizing that census of 1807. In March of 1809, however, the New York legislature attempted to enact new State senate districts a *second* time after the census of 1807. On March 14, 1809, as noted, the New York Council of Revision intervened to prohibit alteration of the earlier districts established by the Legislature in 1808, finding that Article IV did not authorize enactment of legislative districts more than once after each census.[64] In his written opinion for the Council of Revision, Chancellor Kent explained in relevant part that:

> "The bill is to be considered either as a new apportionment of the Senators, or as a new revision of the districts, and in either view it appears to the Council to be inconsistent with the spirit of the Constitution and the public good. . . . By the fourth article of the amendments to the Constitution [ratified in 1801] it is provided that upon the return of every census the Legislature shall apportion the Senators and members of the Assembly; and the Legislature did accordingly, on the first day of April last, by the act entitled 'An act apportioning the representation in the Legislature according to the rule prescribed by the Constitution,' make such apportionment in pursuance of the census in 1807. The apportionment having thus been made, the provision in the Constitution is complied with, and it ceases to operate until the taking of another census. . . .

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[63] *See* 5 *Thorpe*, 2629-2630.

[64] *Alfred B. Street, The Council of Revision of New York*, 352-354 (1859) (hereinafter "*Street*").

> [I]t is extremely important, both as it respects the security of the Constitution and the just rights of the electors which are concerned in these apportionments, that when an apportionment is once made it should be steadily adhered to until the return of another census. There is no rule for making another apportionment by the census of 1807, and that [census] becomes an uncertain guide for a second apportionment, because the population of the districts has varied in the meantime and that variation increases every year. If a second apportionment may be made now, it may equally be made in any future session and even in the year preceding the taking of another census, and thus all accuracy in the rule of the apportionment would be lost and the constitutional objects of the census defeated."[65]

Although the foregoing decision was later derided as an *ultra vires* act at the New York Constitutional Convention of 1821 (by an aggrieved partisan, Anti-Federalist former New York Governor, and then Vice President, Daniel D. Tompkins);[66] the delegates at that convention, without a single dissenting voice, made explicit what had theretofore been generally understood as intended by the New York Constitution since its adoption in 1777. On the Report of the Committee on Legislative Departments chaired by Rufus King,[67] the New York Constitution was

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[65] *Street*, at 352-354.

[66] *See* Nathaniel H. Carter & William L. Stone, *Reports of the Proceedings and Debates of the [New York] Convention of 1821*, 79-80 (1821) (hereinafter "*New York Debates of 1821*").

[67] Rufus King served as a delegate from Massachusetts to the Federal Constitutional Convention of 1787, 3 *Farrand* at 557; and as a delegate to the Massachusetts ratification convention. At the Massachusetts convention, King was a prominent figure in debate concerning

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amended to more clearly express, in accord with the prior decision of the Council of Revision, "that a just apportionment ... may be made by the legislature at the first session after the return of every census, *which apportionment shall remain unaltered until the return of another census.*"[68] Such is the interpretation given by Chancellor Kent ("the country's foremost legal scholar"),[69] Rufus King, and their contemporaries, to a provision in the New York Constitution upon which, alongside Section 17 of the Pennsylvania Constitution of 1776, the Elections Clause was modeled.

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the Elections Clause. 2 *The Debates of the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, 50 (Jan. 21, 1788) (Elliot ed. 1937) (hereinafter "*Elliot's Debates*"). At the Federal Constitutional Convention, King was elected to the five-member Committee that addressed, among other things, the method of Representation in the National Legislature, 1 *Farrand* at 542. After relocating to the State of New York later in 1788, King was elected to the First Congress as U.S. Senator from New York; and, as indicated, was a delegate to the New York Constitutional Convention of 1821.

[68] N.Y.Const., Sec. 6 (1821); 5 *Thorpe*, supra, at 2641 (italics added); *New York Debates of 1821*, at 142, 581-582. The canard that Kent, a Federalist, was motivated by political partisanship when writing the aforementioned opinion for the Council of Revision, *see Griffith*, supra, 60 ("It appears to have been a party vote"), is wholly undercut by the fact that Kent's opinion was joined by two Democratic-Republicans, John Lansing and Smith Thompson, the latter of whom was a "staunch" member of that party. The votes of Lansing and Thompson were necessary for Kent's 4-3 majority opinion. *Horton, James Kent: A Study in Conservatism*, 139 and n. 53 (1939 ed.); *Griffith*, 60 n. 1. It is perhaps also noteworthy that Kent was a member of the Sixteenth Session of the New York Assembly which, in 1792, enacted a congressional redistricting statute that contained an *express* prohibition on multiple intra-census congressional redistricting. *See* footnotes 38 and 39, supra; *New York Assembly Journal*, Sixteenth Session, supra, 3 (Nov. 6, 1792).

[69] *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 278 n. 13 (1977).

As should be evident from the foregoing history, the power conveyed to State legislatures by the Elections Clause must bear some relationship to the purpose of that delegation. With respect to the power to redistrict, the sole purpose of that delegation is undeniable. In answer to the question of why congressional districts were not explicitly prescribed and permanently delineated in the Federal Constitution, Rufus King explained at the Massachusetts ratifying convention that:

> "If it was practicable, he said, it would be necessary to have a district the fixed place; but this is liable to exceptions; as a district that may now be settled, may in time be scarcely inhabited; and the back country, now scarcely inhabited, may be fully settled. Suppose this state thrown into eight districts, and a member apportioned to each; if the numbers increase, the representatives and districts will be increased. The matter, therefore, must be left subject to the regulation of the state legislature, or the general government."[70]

The power to redistrict delegated by the Elections Clause is not, and never has been, animated solely by the "changing and shifting" partisan whims or preferences of a political majority or "ruling faction" within a State or State legislature. Were that the rule, Representatives in Congress "w[ould] not be chosen *by the people*, but w[ould] be the representatives of a faction of [a] state."[71] The Elections Clause power to redistrict, as described by Rufus King above, was a necessity arising from the principle of equal representation based on equal population; and as

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[70] 2 *Elliot's Debates*, 50 (Jan. 21, 1788).

[71] 2 *Elliot's Debates*, 50-51 (italics in original).

explained by James Madison at the Federal Convention, the Elections Clause was not intended to enable, but rather to obstruct when possible, State legislatures that might otherwise "mould their regulations as to favor the candidates they wished to succeed."[72]

More than merely "the best of an ugly array of choices," *Session v. Perry*, supra, 298 F.Supp.2d at 475; Chancellor Kent's "principled discussion" of redistricting power, as quoted herein, incisively recognized, after years of legal study and experience as both a legislator and a jurist, the "extreme" constitutional importance of "stability and continuity" in the electoral system, *Reynolds v. Sims*, supra, 377 U.S. at 583; as well as the principle that redistricting must be legitimately related to the "basic aim" of equal representation based on equal population. Chancellor Kent's reasoning does not rely on any amorphous (and "judicially unmanageable") right to "fairness."[73] Rather, it describes a constitutional rule that is now "well-accepted" across the Nation; that has a pedigree traceable to Section 17 of the Pennsylvania Constitution of 1776; and that has the laudable effect of securing "the policy, so carefully guarded in the constitution, of preventing a change of representative districts intermediate two enumerations, for partisan purposes." *People ex rel. Henderson v. Westchester Board of Supervisors*, 41 N.E. 563, 568 (N.Y. 1895).

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[72] 2 *Farrand*, at 240-241.

[73] *Vieth v. Jubelirer*, supra, 541 U.S. at 291 (plurality opinion per Scalia, J.) ("'Fairness' does not seem to us a judicially manageable standard.")

Simply stated, the State of Texas, with the approval of the District Court, has elevated a purely partisan purpose to the status of a *bona fide* legitimate regulatory objective under the Elections Clause when, as here, such a purpose is conceded by the State of Texas to be wholly unaccompanied by (and wholly unrelated to) any aim to maintain equal representation based on equal population. Far from meriting the reward of undeserved partisan power in the United States Congress, the State of Texas' deliberate, egregious, and unjustifiable violation of Appellants' fundamental representational rights – rights intended by the Framers to be guaranteed Appellants by the Constitution of the United States, warrants "stern condemnation" by this Honorable Court.[74]

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[74] *Cox v. Larios*, supra, 542 U.S. at 951 (Stevens, J., concurring).

CONCLUSION

For the reasons stated, the Court must reverse the decision of the District Court below, and should remand Appellants' case with directions that the relief sought by Appellants, *i.e.*, restoration of the congressional districts established by the District Court in *Balderas v. Texas*, No. 6:01-CV-158 (E.D. Tex.), *aff'd memo.*, 536 U.S. 919 (2002), be granted with all deliberate speed, and in time for valid elections to the 1st Session of 110th Congress of the United States.

Respectfully submitted,

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In The
Supreme Court of the United States

LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The
United States District Court
For The Eastern District Of Texas

BRIEF FOR APPELLEE CHARLES SOECHTING IN SUPPORT OF APPELLANTS

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EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

QUESTION PRESENTED

Whether the 2003 Texas congressional redistricting plan is an excessively partisan gerrymander, in violation of the United States Constitution.

PARTIES TO THE PROCEEDING

Defendant-Appellee filing this Brief is Charles Soechting, Chairman of the Texas Democratic Party, who was sued in his official capacity.

Plaintiffs in the court below include the "Jackson Plaintiffs" (Eddie Jackson, Barbara Marshall, Gertrude "Traci" Fisher, Hargie Faye Jacob-Savoy, Ealy Boyd, J.B. Mayfield, Roy Stanley, Phyllis Cottle, Molly Woods, Brian Manley, Tommy Adkisson, Samuel T. Biscoe, David James Butts, Ronald Knowlton Davis, Dorothy Dean, Wilhelmina R. Delco, Samuel Garcia, Lester Gibson, Eunice June Mitchell Givens, Margaret J. Gomez, Mack Ray Hernandez, Art Murillo, Richard Raymond, Ernesto Silva, Louis Simms, Clint Smith, Connie Sonnen, Alfred Thomas Stanley, Maria Lucina Ramirez Torres, Elisa Vasquez, Fernando Villareal, Willia Wooten, Ana Yañez-Correa, and Mike Zuniga, Jr.); the "Democratic Congressional Intervenors" (Chris Bell, Gene Green, Nick Lampson, Lester Bellow, Homer Guillory, John Bland, and Reverend Willie Davis); the League of United Latin American Citizens (LULAC); the "Valdez-Cox Plaintiff-Intervenors" (Juanita Valdez-Cox, Leo Montalvo, and William R. Leo); the Texas Coalition of Black Democrats (TCBD); the Texas Conference of National Association for the Advancement of Colored People Branches (Texas-NAACP); Gustavo Luis "Gus" Garcia; the "Cherokee County Plaintiff" (Frenchie Henderson); the "GI Forum Plaintiffs" (the American GI Forum of Texas, LULAC District 7, Simon Balderas, Gilberto Torres, and Eli Romero); Webb County and Cameron County; Congresswoman Sheila Jackson Lee and Congresswoman Eddie Bernice Johnson; and Travis County and the City of Austin.

PARTIES TO THE PROCEEDING – Continued

Defendant-Appellees in addition to Charles Soechting are Rick Perry, Governor of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Roger Williams, Secretary of State of Texas; Tina Benkiser, Chairman of the Republican Party of Texas; and the State of Texas. All individual Defendant-Appellees were sued in their official capacities.

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BRIEF OF APPELLEE CHARLES SOECHTING IN SUPPORT OF APPELLANTS

In January 2004, a three-judge District Court upheld Texas's 2003 congressional redistricting plan against various constitutional and statutory challenges. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004). On appeal last fall, this Court vacated and remanded the District Court's decision for further consideration of plaintiffs' partisan gerrymandering claims in light of *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *See Jackson v. Perry*, 125 S. Ct. 351 (2004). On remand, the District Court reaffirmed its prior ruling. It concluded that the Texas gerrymander was not *more* partisan than the Pennsylvania gerrymander that this Court let stand in *Vieth*, and it refused to announce doctrine geared to the context of voluntary off-cycle redistrictings – i.e., redistrictings not required by law, including this Court's one-person, one-vote jurisprudence. That ruling requires reversal by this Court. The Court should clarify what it means for a redistricting plan to be tainted by unconstitutionally excessive partisanship and announce a judicially manageable test (one that the Texas plan manifestly fails) that begins to implement this constitutional understanding.

OPINIONS BELOW

The three-judge District Court's unreported majority and concurring opinions are reprinted at pages 1a to 55a of Appellants Eddie Jackson *et al.*'s Jurisdictional Statement ("J.S. App."). The District Court's final judgment is reprinted at J.S. App. 56a.

JURISDICTION

The District Court issued its ruling on June 9, 2005. J.S. App. 56a. Pursuant to 28 U.S.C. § 2101(b), Appellants Eddie Jackson *et al.* timely filed notices of appeal on July 5, 2005, invoking the Court's jurisdiction under 28 U.S.C. § 1253. This Court noted probable jurisdiction on December 12, 2005.

CONSTITUTIONAL PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment to the Constitution in part prohibits laws "abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Article I, Section 2, Clause 1 of the Constitution provides in part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States."

STATEMENT OF THE CASE

As a result of the 2000 federal decennial census, Texas became entitled to two more seats in Congress, raising its total to 32. However, the Texas Legislature did not reach agreement on a redistricting plan, and Texas Governor Rick Perry declined to call a special session. *Perry v. Del Rio*, 66 S.W.2d 239, 243 n.7 (Tex. 2001). The task thus fell

to a three-judge District Court which ultimately and unanimously imposed a new congressional map, designated Plan 1151C. Neither the State of Texas nor any other defendant appealed the District Court's decision, but a group of voters did. This Court summarily affirmed the District Court's ruling. *Balderas v. Texas*, 536 U.S. 919 (2002). The court-drawn Plan 1151C therefore governed Texas's 2002 congressional election.

That election generated a congressional delegation with 15 Republicans and 17 Democrats – a delegation that became evenly split when one of the Democrats subsequently switched parties. Meanwhile, Republicans enjoyed success in the state legislative elections, winning unified control of the state government. Responding to this shift in state politics, House Majority Leader Tom DeLay, directly and through his organization, Texans for a Republican Majority, prodded state officials to redraw the state congressional map to promote the party's interests.[1] The newly elected 78th Legislature complied. Upon convening in 2003, it announced that it would, for the first time, consider congressional redistricting in the middle of a decade.

This unprecedented effort met resistance. Near the end of the regular session, a group of Democratic state representatives left Texas for Ardmore, Oklahoma, thereby breaking quorum.[2] After the regular session ended, however, Governor Perry called the Texas Legislature into

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[1] DeLay's role in the redistricting was widely publicized. For one account, see Lou Dubose & Jan Reid, *The Hammer: Tom DeLay, God, Money, and the Rise of the Republican Congress* 199-225 (2004).

[2] Tr., Dec. 15, 2003, 1:00 p.m., at 76-77 (Rep. Richard Raymond).

special session to take up congressional redistricting. That first special session too was unproductive. By long-standing tradition, the Texas Senate will not consider a measure without support of a two-thirds supermajority.[3] Accordingly, when 11 of the 31 state senators declared their opposition to taking up congressional redistricting legislation, the redistricting effort was effectively killed. In response, Lieutenant Governor David Dewhurst announced that he would abandon the two-thirds rule for congressional redistricting, and a second special session was called. This time, quorum was broken in the Texas Senate when 11 senators left the State for Albuquerque, New Mexico.[4] But when one of them returned to the State a month later, Governor Perry called a third special session. That session did produce a new map, designated Plan 1374C, which was passed by the House and Senate in October 2003.

Plan 1374C was designed to protect all 15 Republican Members of Congress and to defeat at least 7 of the 17 Democratic Members.[5] It pursued this goal by deploying common gerrymandering tools. Compared to the court-drawn Plan 1151C, for example, the Republican Plan 1374C divided more counties into more pieces,[6] and produced districts that, on average, were much less compact, under either of the two measures the Legislature standardly employed.[7] The Plan also targeted all six Democrats who

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[3] Tr., Dec. 15, 2003, 8:30 a.m., at 7-8 (Sen. Bill Ratliff).

[4] Tr., Dec. 17, 2003, 1:00 p.m., at 119 (Sen. Royce West).

[5] Jackson Pls. Ex. 44 (Alford expert report) at 30.

[6] Jackson Pls. Ex. 141 (Gaddie expert report) at 5-6; Jackson Pls. Ex. 89.

[7] Jackson Pls. Ex. 141 (Gaddie expert report) at 6-7.

had won election in November 2002 on the strength of ticket-splitting voters by pairing them with other incumbents or by substantially increasing the number of Republicans in their districts. The Republican strategy proved extremely successful: The 2004 election (the first, and thus far only, election under the new plan) returned a congressional delegation consisting of 21 Republicans and 11 Democrats.

Texas voters residing in districts across the State challenged the 2003 plan as an unconstitutional partisan gerrymander (under the Equal Protection Clause, the First Amendment, and Article I of the Federal Constitution) and as a violation of both Section 2 of the Voting Rights Act and the racial-gerrymandering doctrine of *Shaw v. Reno*, 509 U.S. 630 (1993). The District Court rejected all these claims and upheld the 2003 map. *Session v. Perry*, 298 F. Supp. 2d 451 (E.D. Tex. 2004). With respect to the partisan gerrymandering claims, the District Court found as a fact that the legislature's entire motivation for redrawing the lawful court-drawn map mid-decade was partisan gain. *See, e.g., id.* at 470 ("There is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage."); *id.* at 472-73 ("Former Lieutenant Governor Bill Ratliff, one of the most highly regarded members of the Senate and commonly referred to as the conscience of the Senate, testified that political gain for the Republicans was 110% of the motivation for the Plan, that it was 'the entire motivation.'"). Nonetheless, the District Court concluded that the plaintiffs had failed to make out a successful legal claim under the standard set by *Davis v. Bandemer*, 478 U.S. 109 (1986).

This Court denied a stay, *Jackson v. Perry*, 540 U.S. 1147 (2004), but later vacated the ruling below and remanded the case for reconsideration in light of *Vieth*. On remand, the District Court noted that considerations other than partisanship influenced the precise location of all "the various cuts and turns of [the] redistricting plan," J.S. App. 15a n.38, but did not disavow its earlier findings that partisan maximization was the sole motive behind the legislature's decision to engage in off-cycle redistricting. Nonetheless, the District Court upheld the plan largely on the grounds that it was no "more partisan in motivation or result" than the Pennsylvania partisan gerrymander that survived review in *Vieth*, and that the plaintiffs had "not identified a way to invalidate the Texas plan under the standards they urge as surviving *Vieth*." J.S. App. 31a. Although the District Court acknowledged that the Texas and Pennsylvania gerrymanders differed in one respect that might be relevant to the construction of a judicially manageable standard – namely, that only the Texas redistricting was conducted off-cycle – it did not find that difference meaningful.

Charles Soechting, Chairman of the Texas Democratic Party, although nominally a defendant, vigorously opposed the 2003 gerrymander and has consistently supported the court-drawn plan. As an appellee who supports the appellants, he files this merits brief in accordance with the appellants' time schedule. *See* Supreme Court Rule 25.1.

SUMMARY OF THE ARGUMENT

In *Vieth v. Pennsylvania*, 541 U.S. 267 (2004), all nine Justices agreed that excessive partisanship in redistricting

is unconstitutional. *See id.* at 292-93 (plurality); *id.* at 316 (Kennedy, J., concurring in the judgment); *id.* at 336 (Stevens, J., dissenting); *id.* at 343-44 (Souter, J., dissenting); *id.* at 360-62 (Breyer, J., dissenting). Four Justices would nonetheless have held all claims of unconstitutionally excessive partisanship to be nonjusticiable. But a majority of the Court disagreed, with four Justices advocating particular tests for administering the constitutional ban on excessively partisan gerrymanders and a fifth, Justice Kennedy, finding no extant approach satisfactory. As Justice Kennedy recognized, "courts confront two obstacles" on the path to adjudicating claims of unconstitutionally excessive partisanship. *Id.* at 306 (Kennedy, J., concurring in the judgment). First, courts must learn to better conceptualize and articulate what it means for partisan motivation to be unconstitutionally excessive. Second, and logically subsequent, they must craft judicially manageable tests for administering or implementing the proper understanding of unconstitutionally excessive partisanship in redistricting. Of course, after these obstacles are surmounted, the third step is for the courts to apply the manageable tests or doctrines to the facts of individual cases.

Courts and academic commentators have long struggled to understand and articulate what it means for a partisan gerrymander to be unconstitutionally excessive. This struggle has not been only, or even mostly, attributable to inevitable differences of opinion regarding precisely where to locate the line between excessive and permissible. Instead, the lack of judicial and scholarly consensus on this question stems from uncertainty regarding how to think about partisanship-in-redistricting as a scalar property, as something that can be present to greater or

lesser degree. In particular, some judges and commentators have worried that amounts or degrees of partisanship must be understood by reference to the electoral outcomes that would have obtained had legislative seats been assigned in proportion to each party's share of the total vote cast. Others have thought that the extent of a plan's partisanship is a function of the extent of its departure from principles of objective or ideal fairness.

There is a different and more appropriate way to conceptualize amounts of partisanship – a conceptualization that does not require agreement on what would constitute an ideally fair redistricting plan and has no connection to the much-feared specter of proportional representation. Simply put, a plan is more or less partisan depending on how far the electoral outcomes its designers expected the plan to produce depart from the outcomes that would likely have obtained had the redistricter not been motivated by partisan objectives at all. That is to say, the partisanship of a plan is a function of the plan's distance from a counterfactual baseline (what the redistricter *would have* done), not from a normative baseline (what the redistricter *should have* done). It follows that a plan is *excessively* partisan, as a constitutional matter, if the redistricter sought too large a partisan advantage relative to what it likely would have realized had it not been motivated by partisanship.

Like all constitutional understandings that take the form of a standard rather than a hard-edged rule, this particular principle might be best enforced by means of a judicially crafted implementing doctrine. This set of appeals, however, does not require the Court to determine precisely what that doctrine should be in the context of ordinary once-per-decade redistricting. Because the

redistricting plan under challenge was adopted outside of the ordinary decennial redistricting cycle, it involves a clearly defined factual predicate ideally suited for the construction of manageable constitutional doctrine. The Court should announce that mid-decade redistricting plans adopted under conditions of one-party control are to be held unconstitutional unless the state proves that the plan is narrowly tailored to achieve a compelling state interest.

Indeed, off-cycle excessively partisan gerrymanders comprise the subset of all excessively partisan gerrymanders that is best suited to policing by means of clear, appropriate, and judicially manageable standards. In truth, the rule we propose is a paradigm of a "rule[] to limit and confine judicial intervention," *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment). If the Court is not willing to draw a line here it will, by having established the *a fortiori* case, likely find itself forever unable to draw one.

If the Court announces the doctrine we propose, the proper result in this case is clear. The mid-decade redistricting engineered by the Texas Republican Party is not narrowly tailored to achieve any compelling interest and should, therefore, be struck down.

ARGUMENT

As an off-cycle redistricting, the 2003 Texas congressional redistricting plan should be subjected to strict scrutiny, and ultimately invalidated, as an unconstitutionally excessive partisan gerrymander.

Section A explains what it means for a redistricting to be tainted by excessive partisanship. Section B proposes and defends one judicially manageable standard for administering the understanding put forth in Section A. Section C applies the standard from Section B to the facts of this case.

A. The best understanding of what it means for partisanship in redistricting to be unconstitutionally excessive is that a party in control of redistricting may not pursue too much partisan advantage relative to the electoral success it would reasonably have expected had it not pursued partisan ends at all.

Given agreement that excessive partisanship in redistricting is unconstitutional, the question that comes immediately to mind is, as Justice Souter put it, "one of how much is too much." *Vieth,* 541 U.S. at 344 (Souter, J., dissenting); *id.* at 298 (plurality). But if that is the most obvious question, it is not the first. Before courts can intelligently decide how much partisanship is too much, they must develop a clearer understanding of what it means for partisanship to be present more or less, a lot or a little.

The Court has often acknowledged and carried out an obligation to draw lines – even more or less arbitrary lines – when constitutional concerns require that a line be drawn. *See, e.g., Burch v. Louisiana*, 441 U.S. 130, 137 (1979) (holding that conviction by a nonunanimous six-person jury violates the Sixth Amendment, and explaining that notwithstanding the absence of a "bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function [adequately]

. . . it is inevitable that lines must be drawn somewhere"); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (holding that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"); *Brown v. Thompson*, 462 U.S. 835, 841-42 (1983) (observing that an Equal Protection challenge to a state apportionment plan makes out a prima facie case, thereby imposing a burden of justification upon the state, if the maximum population deviation exceeds 10%, but not otherwise). Frequently, of course, Justices disagree among themselves over where to locate the constitutional line – they disagree, that is, over how much is too much or how little is too little or how small is too small. Such disagreements can coexist, however, with agreement about the characteristics in virtue of which challenged state action comes closer to, or farther from, that constitutional line – whether that characteristic is the number of persons serving as juror, the length in days of a potential sentence, or the disparity in district populations.

As a majority of the *Vieth* Court emphasized, however, the problem of unconstitutionally excessive partisanship is not like this. When *Vieth* was decided, we did not know – surely we did not have articulate agreement about – precisely how, or by virtue of what, a given redistricting plan would contain or reflect more or less partisanship. *See Vieth*, 541 U.S. at 297 (plurality) ("No test . . . can possibly be successful unless one knows what one is testing *for*."); *id.* at 307-09 (Kennedy, J., concurring in the judgment). This Section responds to precisely that problem. It explains how commentators have sometimes

thought about what a judicially manageable test of excessive partisanship ought to test for; shows why those views are mistaken; and argues for a better understanding.[8]

One temptation is to adopt what could be called a normative baseline – a standard of what an ideally fair redistricting plan would be. From this perspective, the measure of the partisanship behind any particular redistricting plan would be the extent to which it departs, for partisan reasons, from that standard of objective fairness. At some distance from the normative baseline, the degree of partisanship is fairly deemed excessive, making the plan unconstitutional.

Of course, a proponent of the idea that degrees of partisanship should be measured by reference to the "normative baseline" of an objectively fair redistricting plan would need to articulate how fairness itself ought to be determined. There are two basic alternatives. A first possibility is that the ideally fair plan is one that generates seats in proportion to a party's support in the state's electorate as a whole. Because opponents of judicial attempts to police partisan gerrymandering so often claim that proponents of judicial review harbor a secret (or open) attraction to the principle of proportional representation,[9] let us be perfectly clear: We believe that principles of proportional representation furnish the wrong way to think about amounts of partisanship.

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[8] A fuller analysis of this problem appears in Mitchell N. Berman, *Managing Gerrymandering*, 83 Tex. L. Rev. 781, 809-28 (2005).

[9] *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring); Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. Rev. 257 (1985).

If the fairness of a plan is not a function of the extent to which the electoral *outcomes* to which it gives rise approximate the outcomes that a system of proportional representation would produce, fairness might instead be a function of the extent to which the *inputs* relied upon in creating the plan approximate the ideally fair balance of inputs. Keep in mind that no plan is drawn randomly. All plans are designed based on some set of considerations or to further some range of values. Common and legitimate objectives in the shaping of electoral districts include (and are nearly limited to) the following: maintaining contiguity and compactness, following major geographical features like rivers and mountains, tracking political subdivisions, preserving communities of interest, ensuring no diminution in the voting strength of racial and ethnic minorities, protecting incumbents, securing public acceptance, maintaining the cores of prior districts to thereby enhance representatives' accountability to their constituents, and promoting party electoral success. If there existed some ideally fair way to balance these disparate values, then the greater a given plan's departure from this balance, the more partisan the plan would be (assuming that the departures are fairly explained on partisan grounds).

The problem, as Justice Kennedy bemoaned in *Vieth*, is that we lack any consensus regarding what the right balance of inputs is. "No substantive definition of fairness in districting seems to command general assent." 541 U.S. at 307 (Kennedy, J., concurring in the judgment). This is undeniably true. But the absence of either a present-day consensus or good evidence of a traditionally accepted standard does not signal that courts and litigants have not looked hard enough into the historical record. It signals

instead that *any proposed conception of amounts of partisanship that would rely on principles of fair districting is a mistaken conception of what it means for partisanship in redistricting to exist in greater or lesser degree.*

There is a different and better way to conceptualize amounts of partisanship: A plan is more or less partisan depending on how far the expected electoral outcomes depart, not from what would have been fair, but from the outcomes that would likely have obtained had the redistricter not been motivated by partisan objectives at all. That is to say, the partisanship of a plan is a function of the plan's distance from a counterfactual baseline (what the redistricter *would have* done), not from a normative baseline (what the redistricter *should have* done).

That these three ways to conceptualize amounts of partisanship – what one might call the "proportional representation," "fairness," and "counterfactual" conceptions – are, indeed, meaningfully different from one another can be illustrated with a simple hypothetical.

Imagine two states, X and Y, of roughly equal size and population – a population that, say, entitles each state to 20 seats in the House of Representatives. In State X, Party A enjoys a 55%-45% advantage over Party B in total electoral support and also controls the state legislature and the governorship. In State Y, the parties' roles are reversed: Party B consistently receives 55% of the total votes cast and controls the legislature and the governorship. In both states, nonpartisan expert commissions have been authorized by previous legislation to draw all necessary redistricting plans; by tradition, legislative endorsement of the commission-proposed plans has been pro forma.

Imagine further that the nonpartisan commissions have completed their work. The State X commission was chiefly motivated to maximize the average geometric compactness of districts, virtually without regard for conformity to the boundaries of political subdivisions. The State Y commission, in contrast, was principally concerned that district boundaries should, to the greatest extent possible, respect the integrity of political subdivisions. It sought to ensure that no district was egregiously noncompact but was unconcerned with average district compactness. As a consequence of this (radically simplified) sketch of the considerations each commission relied upon, the resulting maps have markedly dissimilar features. But because they were drawn by nonpartisan commissions, the plans share this in common: By hypothesis, neither was infected by partisan considerations, which is to say that no line was drawn based on predictions of how its placement would affect the political fortunes of either party. This is not to say that the fortunes of the parties under these plans are impossible to predict. Far from it. Given highly detailed political databases, the expected electoral outcomes of any proposed electoral map are predictable with fair (though not perfect) accuracy. That, of course, is what makes partisan gerrymandering possible. Suppose then that the State X plan was likely to produce a congressional delegation with 14 As and 6 Bs, and that the State Y plan was likely to produce a delegation consisting of 10 As and 10 Bs.

Finally, imagine that, in a sharp break with tradition, each state legislature decides not to accept its commission's plan. Believing that its commission was too interested in ensuring average district compactness, the State X legislature redraws the commission-proposed map to

produce greater conformity both with major geographical features like mountains and rivers and with the boundaries of political subdivisions like cities and counties. The legislature's substitute plan does not, however, alter each party's electoral prospects; like the commission plan it replaces, the legislature's plan is expected to produce a 14-6 advantage for Party A. Meanwhile the State Y legislature replaced the handiwork of its commission largely in order to improve Party B's electoral prospects. By reshaping the map in ways both large and small it produced and enacted a plan likely to give Party B a 13-7 edge in the state's congressional delegation.

After *Vieth*, the bottom-line constitutional question (a question that exists whether or not claims of partisan gerrymandering are justiciable) is whether either of the two enacted plans embodies unconstitutionally excessive partisanship. As we have been emphasizing, however, determining "how much is too much" depends first on knowing "what is more and what is less." So which of these two redistricting plans embodies more partisanship than the other, and is thus more likely to cross the constitutional line?

If the right way to think about amounts of partisanship is in terms of a plan's departure from what is "fair," and if fairness is determined by reference to outcomes under a scheme of proportional representation, then the plan adopted in State X is more partisan than that adopted in State Y. Or, if fairness remains the relevant touchstone, but what is fair depends upon the application of "comprehensive and neutral principles for drawing electoral boundaries," *Vieth*, 541 U.S. at 306-07 (Kennedy, J., concurring in the judgment), then we cannot yet know which scheme is more partisan. We would need first to

reach agreement on, among other things, the appropriate weight to give district compactness relative to other line-drawing considerations. But if "fairness" is the wrong baseline, and if a plan is more or less partisan depending on how far it departs from what the redistricter would have done had it not been motivated by partisan objectives at all, then State Y's plan is more partisan than State X's. We submit that this is the right answer, and that the counterfactual baseline furnishes the right way to think about amounts of partisanship in redistricting. Accordingly, the acknowledged absence of "agreed upon substantive principles of fairness in districting," *id.* at 307 (Kennedy, J., concurring in the judgment), is not itself a bar to meaningful judicial review.

It might be objected that judgments about States X and Y are possible in this hypothetical only because of the artificial set up. We can reach confident conclusions about what the legislatures of States X and Y would have done had they not considered partisan advantage at all only on the assumptions, first, that each legislature substituted a legislature-drawn map for one proposed by a nonpartisan commission and, second, that such substitutions were, in each state, unprecedented. In the real world, the objection might continue, courts will not be able to make the requisite counterfactual determinations.

As an *observation* this is certainly true. But if pressed as an *objection* to our analysis, it wholly misses the point. We are not, in this Section, proposing what we think is a judicially manageable standard. We are offering a conceptualization of amounts of partisanship in the belief that conceptualization is logically antecedent to the construction of sensible and manageable judicial doctrine. What

the Court should *do* with this proper conceptualization is the subject of Section B, *infra*.

That the "counterfactual baseline" conceptualization of amounts or degrees of partisanship we propose is correct is reinforced by considering a kindred problem – vindictive sentencing. As the Court has long recognized, "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (internal quotations omitted). Suppose, then, that a criminal defendant challenges his ten-year sentence on the ground that it unconstitutionally punishes him for exercising some constitutional right – say, the right to jury trial or the right to appeal.

Nobody would think that, in order to succeed, the challenger must establish that ten years is longer than what would have been fair.[10] For if redistricting is marked by a striking lack of agreement on any "principled, well-accepted rules of fairness," *Vieth*, 541 U.S. at 308 (Kennedy, J., concurring in the judgment), the same is equally true of sentencing. As this Court has long recognized, not only does the Eighth Amendment "not mandate adoption of any one penological theory," but states have never reached "agreement on the purposes and objectives of the

[10] Even were establishing the sentence's "unfairness" sufficient to make out an Eighth Amendment violation, it is plainly not sufficient, let alone necessary, to demonstrate a violation of due process.

penal system." *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring in part and concurring in the judgment). To the contrary, "the federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id.* at 999. If legislatures disagree over what is the fair or appropriate sentencing range for different offenses, so too do individual sentencing judges reasonably disagree over the fair sentence to impose on any given defendant within a statutorily permissible range.

Precisely because of this dissensus regarding what fairness dictates, a sentencing judge violates the Due Process Clause not by imposing a sentence that is "unfair," but by imposing one that exceeds *what she would have imposed had she not been motivated by vindictiveness.* The relevant baseline for determining whether a given sentence is vindictive, hence unconstitutional, is not the sentence that *is* just in all respects but rather, as Judge Wald put it, the sentence that the sentencing judge "*believes* just in all respects." *United States v. Jones*, 997 F.2d 1475, 1484 (D.C. Cir. 1993) (en banc) (Wald, J., dissenting) (emphasis added). Or, as Judge Easterbrook expressed it, the constitutionally relevant "benchmark" is not what should have happened, but what "would have happened." *United States v. Klotz*, 943 F.2d 707, 710 (7th Cir. 1991).

This is the same way to think about partisanship in redistricting. The measure of partisanship has nothing to do with what some objective principles of fairness require and everything to do with what plan the redistricter would have crafted had it not been motivated by partisanship. Indeed, the analogy between redistricting and sentencing is revealing for another reason as well. By recognizing that

the true constitutional question is whether a sentencing authority was motivated by vindictiveness, courts did not thereby fool themselves into thinking that judicial implementation of this constitutional understanding requires reviewing courts to undertake a direct totality-of-the-circumstances inquiry into the sentencing judge's actual reasons for a challenged sentence. Instead, the Court set about debating what judicially manageable rules might adequately substitute for direct inquiry into the presence or absence of vindictiveness.[11] As we will explain, the same strategy is appropriate in the context of partisan gerrymandering.

B. As a way to administer the foregoing understanding of unconstitutionally excessive partisanship in redistricting, the Court should subject to strict scrutiny off-cycle redistricting plans adopted under conditions of single-party control.

Once armed with a better understanding of what, for constitutional purposes, excessive partisanship means,

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[11] *See, e.g., North Carolina v. Pearce*, 395 U.S. 711, 726 (1969) (announcing a new rule that a sentencing order that imposes a more severe sentence after retrial than the defendant had initially received will be adjudged unconstitutional unless the reasons for the increase are stated in the order itself); *Texas v. McCullough*, 475 U.S. 134, 142 (1986) (converting the *Pearce* rule into a presumption rebuttable by objective information); *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974) (holding that when a prosecutor initially indicts on a misdemeanor charge, and the defendant avails himself of a statutorily afforded trial de novo, the prosecutor may not reindict the defendant on a felony charge for the same conduct; and emphasizing that such a prophylactic rule is "not grounded upon the proposition that actual retaliatory motivation must inevitably exist").

how should the Court proceed? As Justice Scalia rightly observed in a different context, courts have three options. They "can avoid arbitrariness in their review only by policing the entire spectrum . . . , by policing none of it, or by adopting rules which subject to scrutiny certain well-defined classes of actions thought likely to come at or near the [unconstitutional] end of the spectrum." *American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 305 (1987) (Scalia, J., dissenting).

A plurality of the *Vieth* Court advocated the second option – police no claims of unconstitutional partisan gerrymandering. Of course, a majority of the Court rejected that route, with Justice Kennedy emphasizing that even if that route were eventually to prove the wisest, to embrace that option now would be premature. *Vieth,* 541 U.S. at 309-11 (Kennedy, J., concurring in the judgment). And if a declaration of nonjusticiability would have been premature barely a year ago, it would be even more inappropriate today given, as Section A demonstrates, that substantial progress has already been made in conceptualizing constitutionally excessive partisanship. Consequently, the first and third options remain: subject all claims of excessive partisanship in redistricting to meaningful judicial scrutiny, or adopt rules which limit meaningful scrutiny to well-defined sub-classes of redistrictings that are claimed to issue from unconstitutionally excessive partisanship.

We do not prejudge whether the first option might, in time, prove most sensible if technological advances supply courts with adequately precise, predictable, and appropriate proxies for excessive partisanship in redistricting. Nonetheless, the third option is the more modest step and, for that reason, more to be desired if possible. The challenge

for a Court that hopes to pursue the third option, however, is to identify with reasonable particularity those classes of redistrictings which are disproportionately likely to embrace instances in which the redistricter pursued partisan ends to an unconstitutionally excessive degree. Naturally, there could be several different sets of circumstances, all describable in adequately clear and objective terms, in which a redistricter was especially likely to have been motivated by unrestrained partisan greed. So courts might, over time, develop a number of predicates for application of heightened scrutiny.

This litigation, however, furnishes opportunity for the construction of one in particular – the most obvious and the most needed. Were one to rack one's brains to imagine conditions under which a legislative redistricting is especially likely to have issued from excessive partisanship it would be hard to improve upon the circumstances that this case represents – namely, that the redistricting was undertaken voluntarily by a state legislature controlled by a single party. Redistricting is costly. As the scores of public hearings and the three special sessions that were required to pass the 2003 Texas plan attest, redistricting consumes time and resources that could be spent doing what legislators were elected to do – draft and pass legislation. Redistricting also produces instability. As the Colorado Supreme Court explained:

> If the districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents. Moreover, the time and effort that the

> constituents and the representative expend getting to know one another would be wasted if the districts continually change.

People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1242 (Colo. 2003).

It is not surprising, therefore, that legislatures have historically not redistricted any more often than they must. Given the substantial costs of redistricting, a redistricting authority that chooses to do so when it need not must anticipate even more substantial benefits. And when a single party initiates and directs that voluntary redistricting, the benefits most to be expected are benefits *to that party*. In such a case, the sought-for prize must be especially great because a *voluntary* partisan gerrymander constitutes an unusually great threat to inter-party cooperation – as, once again, the Texas experience demonstrates. It follows that when a redistricting authority under one-party control engages in a voluntary off-cycle redistricting it is extremely likely to be motivated to satisfy a wholly immoderate partisan appetite. This Court should therefore announce that all such redistricting plans must be subject to strict scrutiny, and thus invalidated unless narrowly tailored to achieve a compelling state interest.

Again, to forestall possible misinterpretation, let us be clear: We do not contend that mid-decade redistricting is unconstitutional. Rather, we are advocating that the Court adopt what is commonly (if loosely) called a prophylactic rule.[12] Because mid-decade redistricting is so likely to be

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[12] In *Dickerson v. United States*, 530 U.S. 428 (2000), two Justices opined that the Court lacked constitutional authority to announce

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marred by unconstitutionally excessive partisanship, courts should invalidate mid-decade plans adopted under conditions of one-party control unless persuaded that they are narrowly tailored to achieve a compelling interest. In other words, the justification for strict scrutiny here is the same justification often claimed for the application of strict scrutiny to facially racial classifications – not because a compelling interest is always constitutionally required even if the relevant state actor was not in fact motivated by the constitutionally impermissible motives (*e.g.*, excessive partisanship, racial animus), but because the test serves, in an evidentiary manner, to "smoke out" whether the constitutionally impermissible motives were present or not. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

In short, the rule we propose ideally enables the Court to "subject to scrutiny [one] well-defined class[] of actions thought likely" to be unconstitutional. *Scheiner,* 483 U.S. at 305 (Scalia, J., dissenting). But that is not its only virtue. In addition to being the class of unconstitutionally partisan redistrictings easiest to police, it is also the class most in need of it, for excessively partisan redistrictings produce especially large social costs when they occur off-cycle.

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prophylactic rules. *Id.* at 445-46 (Scalia, J., joined by Thomas, J., dissenting). Seemingly, the rest of the Court disagreed. For a post-*Dickerson* analysis that clarifies the relationship between court-interpreted constitutional meaning and court-constructed constitutional doctrine, see Mitchell N. Berman, *Constitutional Decision Rules,* 90 Va. L. Rev. 1 (2004). This understanding is further developed and defended in Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does,* 91 Va. L. Rev. 1649 (2005).

To understand why, recall Justice O'Connor's speculation in *Bandemer* that "political gerrymandering is a self-limiting enterprise." 478 U.S. at 152 (O'Connor, J., concurring) (citing Bruce Cain, *The Reapportionment Puzzle* 151-59 (1984)). Relying on the work of political scientist Bruce Cain, Justice O'Connor reasoned, in essence, as follows. The extremity of a gerrymander is a function of the extent to which the controlling party can make its own districts efficient (involving very small margins of victory) and the opposing party's districts inefficient (very large margins of victory). But the more efficient the district, the bigger the risk. Because the party itself and the individual incumbents will be somewhat risk averse, they will draw districts to produce larger cushions than rigorous pursuit of partisan advantage would seem to dictate.

There is surely *something* to the Cain-O'Connor analysis. But the efficiency that a party or an incumbent will tolerate is not only a function of its or her degree of risk aversion, it's also a function of the time horizon.[13] The

[13] Furthermore, the severity of a gerrymander is a function not only of the efficiency that the controlling party will tolerate (which is itself a function of the time between redistrictings), but also of the extent to which that party is willing to flout traditional districting criteria. The more noncompactness that partisan mapmakers are willing to tolerate, the bigger the cushion they can provide themselves to ameliorate risk. It is not surprising, therefore, that Cain's relatively sanguine assessment that partisan gerrymandering can be kept within acceptable bounds without judicial intervention seemed to rest on his assumption that redistricters won't "resort[] to wildly noncompact shapes." Cain, *The Reapportionment Puzzle* at 150. But as the Pennsylvania redistricting map reviewed in *Vieth* showed, and as Texas Plan 1374C reconfirms, this assumption is no longer sound, if ever it was. Given that the proportion of competitive districts has declined substantially over the two decades since *Bandemer*, while most observers believe that the severity of partisan gerrymandering has increased, the District Court's choice to characterize as "prescient" the *Bandemer*

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riskiness of any given district is inversely proportional to the expected margin of victory in the next election and directly proportional to the expected number of elections before the next redistricting – as Professor Cain's own analysis makes clear.[14] Therefore, Justice O'Connor's argument that political gerrymandering is likely to be self-limiting actually *presupposes* that redistricting will occur only once per decade. Significantly, if a party's control of the state legislature is secure, the mere *possibility* of off-cycle redistricting can be enough to embolden gerrymanders more extreme than would otherwise occur: The party can accept narrower expected margins of victory in its "own" districts than it otherwise would, so long as it can be confident that off-cycle redistricting will be possible if those highly efficient districts threaten to become too risky. So a regime that permits off-cycle redistricting is likely to produce more egregious gerrymanders *even when that option is not exercised.* For this reason, the tradition that district lines be redrawn only after the decennial census has made a change necessary constitutes the single greatest natural constraint on partisan gerrymandering.[15]

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concurrence's hope that partisan gerrymandering might in effect police itself, *see* J.S. App. 27a, is inexplicable.

[14] *See, e.g.*, Cain, *The Reapportionment Puzzle* at 152 (explaining that a majority party's willingness to gerrymander depends on its "estimate of *long-range* political and demographic trends") (emphasis added); *id.* at 156 (referring to one study that "suggests that whatever partisan advantage the controlling party gets from reapportionment tends to erode quickly over time with changes in the composition of districts," and concluding that "partisan gerrymandering is technically difficult because time and geography can undo the reapportioner's craft").

[15] This tradition limits partisan gerrymandering in another way, too. If legislatures are permitted to redistrict whenever they want, they

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In sum, the rule we propose – that voluntary off-cycle redistricting plans created by state districting bodies controlled by one party be subjected to strict scrutiny – represents ideal constitutional doctrine. It bears an appropriately tight relationship to the underlying constitutional violation, is easily managed by the judiciary, provides clear guidance to legislatures, will have the salutary effect of dampening the degree of partisanship even outside the confines of its application, and produces slight if any social costs.[16] If this is not an appropriate rule to administer the constitutional ban on excessive partisanship in redistricting, then nothing is.[17]

Not surprisingly, then, the District Court did contemplate the possibility of a judge-made prophylactic rule

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can choose to do so when the state government is fully in the hands of a single party. But permitting redistricting to occur only at specified times (after each decennial census is reported) increases the chance that the legislature to whom the obligation falls will be unable to advance strictly partisan goals. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 776-82 (2004).

[16] *Miranda v. Arizona*, 384 U.S. 436 (1966), which (as we will see) the District Court viewed as providing a revealing comparison in other respects, is relevant on this point as well. Even if wise on balance, that the *Miranda* doctrine produces substantial social costs cannot be denied. *See, e.g., Dickerson v. United States*, 530 U.S. at 444 ("The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result."). The cost of our proposed test, in contrast, is to discourage mid-decade redistricting – something that this nation has done just fine without through most of its history.

[17] A rule that subjects mid-decade redistrictings to heightened scrutiny can also be justified as a means to implement the Equal Protection Clause's prohibition on malapportionment. *See* Brief of Appellants Travis County, Texas, Gustavo Luis "Gus" Garcia, and City of Austin, Texas.

tailored to the context of mid-decade redistricting.[18] For such a rule to be announced, it said, would make this case "the *Miranda* of redistricting jurisprudence." J.S. App. 19a. It then rejected this course, however, by reasoning that

> [i]t is a much smaller step from the two underlying building blocks of *Miranda* – the due process and Sixth Amendment-based right to not be convicted upon an involuntary confession and an experience-based factual judgment of the inherently coercive environment of the station house – to the implementing prophylactic of *Miranda's* warning requirement. The baseline in *Miranda* was a settled constitutional principle, not an elusive condemnation of conduct that some would say is antithetical to American ideals and others would say is politics as old as the Republic itself.

Id. at 19a-20a.

In other words, the District Court concluded that a prophylactic rule addressed to off-cycle redistricting would be *less* supportable than was the *Miranda* prophylactic rule because the constitutional understanding that the *Miranda* Court sought to implement by means of prophylactic judge-announced doctrine was more secure, and

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[18] What we propose is not identical to what the District Court contemplated. For purposes of the argument in text, however, it is not essential to focus on the precise respects in which our formulations, both of the underlying constitutional understanding and of the proposed judge-crafted implementing doctrine, differ from what the District Court imagined.

because the *Miranda* prophylactic rule is more proportional to the underlying constitutional violation.[19]

In both respects, the District Court was mistaken. First, the constitutional rule that the *Miranda* majority chose to administer via the warnings requirement was not, as the District Court erroneously stated, "the due process and Sixth Amendment-based right to not be convicted upon an involuntary confession." It was the Fifth Amendment's guarantee that no person "shall be compelled in any criminal case to be a witness against himself." And far from being "settled constitutional principle," the proposition that the privilege against self-incrimination makes inadmissible statements that were compelled during police interrogation was both novel and resisted by four Justices in *Miranda* itself. *See Miranda v. Arizona*, 384 U.S. 436, 503 n.4 (1966) (Clark, J., dissenting); *id.* at 526-31 (White, J., joined by Harlan and Stewart, JJ., dissenting); *see also New York v. Quarles*, 467 U.S. 649, 654 (1984) ("In *Miranda* this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police."). In contrast, all nine Members of the *Vieth* Court agreed that the Constitution forbids excessive partisanship in redistricting.

Second, the District Court's apparent belief that *Miranda's* prophylactic rule effectuated only a small degree of prophylaxis rests on a confusion. It may be true, as the District Court observed, that the "environment of

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[19] The District Court may also have believed that only the Supreme Court, and not itself, has authority to announce a prophylactic rule. *See* J.S. App. 19a (discussing what "the Supreme Court" could do).

the station house" is "inherently coercive." J.S. App. 19a. But that does not entail that all statements elicited during custodial interrogation were actually *compelled* within the meaning of the Fifth Amendment, which is the constitutional question. To the contrary, Members of this Court have suggested that the prophylactic swath cut by the *Miranda* warnings requirement is broad indeed. *See, e.g.*, *Withrow v. Williams*, 507 U.S. 680, 702 (1993) (O'Connor, J., concurring in part and dissenting in part) (observing that, "'in the individual case, *Miranda's* preventive medicine [often] provides a remedy even to the defendant who has suffered no identifiable constitutional harm'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 307 (1985); bracketed language in *Withrow*). For the reasons we have already given, however, to subject to strict scrutiny off-cycle redistrictings undertaken by a redistricting authority under single-party control would likely work an exceedingly modest degree of prophylaxis.[20]

In sum, the District Court was correct when observing in 2004 that "if the judiciary must rein in partisan gerrymandering," its best alternative would be to craft "limitations that focus upon the time and circumstances of partisan line-drawing." *Session v. Perry*, 298 F. Supp. 2d at 475. This Court's remand invited the District Court to do precisely that. The District Court's stated grounds for declining that invitation are plainly wrong.

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[20] Because the underlying constitutional violation we take from *Vieth* is broader than what the District Court contemplated, and because our proposed prophylactic rule is narrower than what the District Court entertained, *see supra* note 18, the doctrinal test we propose is much more proportional to the constitutional wrong than the District Court assumed.

C. The 2003 Texas congressional redistricting plan, which was adopted under conditions of single-party control, is not narrowly tailored to achieve a compelling interest, and should therefore be held unconstitutional.

Application of our proposed rule to the facts of this case is straightforward.

The rule's predicate is plainly satisfied. The 2003 Texas congressional redistricting plan was adopted when both houses of the state legislature were controlled by the Republican Party, as was the Governorship. As the minority party, the Democrats had no meaningful opportunity to affect the redistricting plan. Democratic legislators did not decamp to a Holiday Inn in Ardmore, Oklahoma for the free HBO.

While the District Court did not subject the redistricting plan to strict scrutiny, it is quite clear how the state would be compelled to argue were strict scrutiny to be applied. During the redistricting process, many Republican legislators announced candidly that the redistricting was designed to maximize their party's prospects for electoral success.[21] Once in litigation, however, their lawyers have sought to defend the plan as an effort to "remov[e] the dead-hand effect of the 1991 Democratic gerrymander." Motion to Affirm at 5, *Session v. Perry*, 298

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[21] Indeed, one of the chief legislative architects of the 2003 plan acknowledged at trial that congressman DeLay and the Republican leadership had set out to "get as many seats as we could." Tr., Dec. 18, 2003, 1:00 p.m., at 142 (trial testimony of State Rep. Phil King). As one Republican staffer had put it, Plan 1347C "should assure that Republicans keep the House [of Representatives] no matter the national mood." Jackson Pls. Ex. 129 (Joby Fortson e-mail message).

F. Supp. 2d 451 (E.D. Tex. 2004) (No. 03-1391). The District Court agreed that the record supports this characterization. J.S. App. 21a-22a.

We disagree with this finding. After all, the *Balderas* Court that drew Plan 1151C explained that it started with a blank map of Texas and then applied neutral districting factors. But even assuming arguendo both that the prior plan was a Democratic gerrymander, and that the dismantling of a prior gerrymander is a compelling state interest, any notion that the plan under review was narrowly tailored to further that interest is preposterous. All parties' experts agreed at trial that this gerrymander was so severe and anticompetitive that Republicans would continue holding at least 20 or 21 of the State's 32 seats even if Democrats once again became the dominant party in the Texas electorate.[22]

Concededly, the Court "ordinarily do[es] not decide in the first instance issues not resolved below." *Pierce County v. Guillen*, 537 U.S. 129, 148 n.10 (2003). But this is not an inexorable command. When proper application of legal test to the facts is as plain as in this case, the Court frequently applies the test on its own instead of remanding for an entirely predictable end result. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 427-28 (2004) (holding that the state supreme court had erred in applying a rule of automatic unconstitutionality to the checkpoint stop at issue, that the proper constitutional test was one of all-things-considered reasonableness, and that the checkpoint stop

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[22] *See, e.g.*, Jackson Pls. Ex. 44 (Alford expert report) at 23-28, 34, 38; Jackson Pls. Ex. 141 (Gaddie expert report) at 3, 19, 24.

was reasonable); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 268-71 (1977) (holding that plaintiffs had failed to prove a racially discriminatory purpose, as required by *Washington v. Davis*, 426 U.S. 229 (1976), even though *Davis* had been decided after the appellate court decision under review and the lower courts had not applied the *Davis* analysis).

Wisely, the Court has often refused to "be blind" to what "[a]ll others can see and understand." *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922). That the 2003 Texas congressional redistricting plan was not merely a narrowly drawn corrective to a supposedly prior Democratic gerrymander, but instead an extreme Republican gerrymander of its own, is common knowledge. For the sake of complying with procedural niceties, the Court should not affect ignorance of this truth – especially where, as here, the cost of a remand would be the holding of another election under an unconstitutional plan. *Cf. Troxel v. Granville*, 530 U.S. 57, 74 (2000) (declining to remand the case for further proceedings in the state court out of regard for the fact that "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship that the constitutional right of a custodial parent to make certain basic determinations for the child's welfare becomes implicated'") (quoting *id.* at 101 (Kennedy, J., dissenting)).

CONCLUSION

The Court should reverse the judgment below, and direct the District Court to reinstate the lawful plan it drew and unanimously adopted in 2001.

Respectfully submitted,

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January 10, 2006

(4)

No. 05-254

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In The
Supreme Court of the United States

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF FOR TRAVIS COUNTY APPELLANTS

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QUESTION PRESENTED

Does the Texas legislature's 2003 replacement of a legally valid congressional districting plan with a statewide plan, enacted for "the single-minded purpose" of gaining partisan advantage, satisfy the stringent constitutional rule of equipopulous districts by relying on the 2000 decennial census and the fiction of inter-censal population stability?

LIST OF PARTIES

Plaintiffs and Plaintiff-Intervenors below:

Travis County, Texas; City of Austin, Texas; Gustavo Luis "Gus" Garcia; Eddie Jackson; Barbara Marshall; Gertrude "Traci" Fisher; Hargie Faye Jacob-Savoy; Ealy Boyd; J. B. Mayfield; Roy Stanley; Phyllis Cottle; Molly Woods; Brian Manley; Tommy Adkisson; Samuel T. Biscoe; David James Butts; Ronald Knowlton Davis; Dorothy Dean; Wilhelmina R. Delco; Samuel Garcia; Lester Gibson; Eunice June Mitchell Givens; Margaret J. Gomez; Mack Ray Hernandez; Art Murillo; Richard Raymond; Ernesto Silva; Louis Simms; Clint Smith; Connie Sonnen; Alfred Thomas Stanley; Maria Lucina Ramirez Torres; Elisa Vasquez; Fernando Villareal; Willia Wooten; Ana Yañez-Correa; Mike Zuniga, Jr.; Frenchie Henderson; American GI Forum of Texas; Simon Balderas; Gilberto Torres; Eli Romero; League of United Latin American Voters District 7; League of United Latin American Voters; Webb County; Cameron County; Juanita Valdez-Cox; Leo Montalvo; William R. Leo; Coalition of Black Democrats; Texas NAACP; Lester Bellow; Homer Guillory; John Bland; Rev. Willie Davis; and Congressmembers Sheila Jackson Lee, Eddie Bernice Johnson, Chris Bell, Gene Green, and Nicholas Lampson

Defendants below:

State of Texas; Rick Perry, Governor of Texas; Geoffrey S. Connor, Secretary of State of Texas; David Dewhurst, Lieutenant Governor of Texas; Tom Craddick, Speaker of the Texas House of Representatives; Charles Soechting, Chair of the Texas Democratic Party; Tina Benkiser, Chair of the Texas Republican Party

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BRIEF FOR TRAVIS COUNTY APPELLANTS

OPINIONS BELOW

The district court's opinion on remand is reported at 399 F.Supp.2d 756 and reprinted at Travis J.S. App. 1a-58a. The district court's pre-remand opinion is reported at 298 F.Supp.2d 451 and reprinted at Travis J.S. App. 59a-214a.

JURISDICTION

Acting under 28 U.S.C. § 2284, the three-judge district court issued its opinion and judgment on remand on June 9, 2005, adhering to its earlier judgment and denying the injunction requested by the plaintiffs and plaintiff-intervenors. Travis J.S. App. 42a, 230a. Travis County and the City of Austin filed their notice of appeal on June 25, 2005. Travis J.S. App. 231a. Gus Garcia filed his notice of appeal on July 5, 2005. Travis J.S. App. 233a-235a. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article I, section 2, clause 1, of the Constitution of the United States provides in relevant part:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .

Article I, section 2, clause 3, of the Constitution of the United States provides in relevant part:

> Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . .

Section 2 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. . . .

STATEMENT OF THE CASE

A. Reapportionment, the 2000 census, and the 2001 *Balderas* plan

At the end of 2000, the President forwarded to Congress the state population figures for the 2000 federal decennial census. Stip. 81.[1] As a result of the state's comparatively rapid population growth during the preceding decade, Texas was apportioned two additional seats in the United States House of Representatives, bringing its congressional delegation to 32 members. Stip. 1, 81.

Texas received the more detailed block-level census data needed for redistricting in the early spring of 2001. Stip. 82; Travis J.S. App. 61a. The Texas legislature then took up the task of fashioning legislation to account for the two new congressional seats and equalize population across all the districts, as required by the one person, one vote rule.[2]

The legislature failed to complete its redistricting duties during the year leading up to the 2002 Texas congressional elections. First, it deadlocked and failed to enact a plan by the end of its regular session in May 2001. *Perry v. Del Rio*, 66 S.W.3d 239, 246 (Tex. 2001). Then, the

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[1] "Stip." refers to the Stipulations and Uncontested Facts, which are Part E of the Joint Final Pretrial Order.

[2] Though the Texas Constitution is silent as to establishing congressional districts, it is understood to be a legislative task. TEX. ATT'Y GEN. OP. GA-0063, at 5 (April 23, 2003); *see also* Travis J.S. App. 81a-82a n.48.

Governor ended any possibility of legislative action before the 2002 congressional elections with his mid-summer 2001 announcement that he would not call a special session on the issue. *Del Rio*, 66 S.W.3d at 243 & n.7.

State court proceedings also ended without a congressional plan. Travis J.S. App. 61a. Reapportionment and the equal population rule compelled redistricting, though, and it fell to the three-judge federal court in *Balderas v. Texas* to perform the congressional redistricting task and "bring the district map into line with the equal population rule," while adding the two new seats and complying with the Voting Rights Act. Travis J.S. App. 83a.

The *Balderas* court issued its opinion and accompanying Texas congressional map in late 2001, in time for use in the 2002 congressional election cycle. Stip. 2, 70.[3] Accepting for the time being the *Balderas* map, labeled Plan 1151C, the state chose not to appeal – and even urged affirmance when others did appeal. This Court summarily affirmed, upholding Plan 1151C. *Balderas v. Texas*, 536 U.S. 919 (2002). The 2002 elections under Plan 1151C concluded in November of that year with Democrats maintaining a tenuous 17-15 majority in the Texas congressional delegation. Travis J.S. App. 89a.[4]

B. The 2003 legislative plan: 2003 politics and the 2000 census

A couple of months later, the Texas legislature convened again in regular session, this time with Republicans

[3] The unreported 2001 *Balderas* decision is at Travis J.S. App. 215a-229a.

[4] Before the next round of elections, the delegation became evenly balanced – 16 Democrats and 16 Republicans – when Congressman Ralph Hall switched parties.

in control as a result of the 2002 state legislative elections.[5] The legislature was formally advised that it was not required to take any action on congressional redistricting and that, as a matter of state law, the thirty-two Texas districts under Plan 1151C could remain in place for the rest of the decade. *See* TEX. ATT'Y GEN. OP. GA-0063.[6]

Prodded by such high-profile national political figures as then-House Majority Leader Tom DeLay and the White House's Karl Rove, the new legislative majority decided to press on anyway, to try to substantially increase the number of Republican seats in the Texas congressional delegation. Travis J.S. App. 89a; Tr., Dec. 15, 2003, 8:30 a.m. (Sen. Ratliff), at 12-13; Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 141. The regular session ended in late May with no action, stymied by the widely-publicized quorum-busting flight of most House Democrats to Ardmore, Oklahoma. Tr., Dec. 15, 2003, 1:00 p.m. (Rep. Raymond), at 76-77. The Governor promptly called two special sessions. They, too, ended without action on a congressional plan, blocked first by the state Senate's unique two-thirds supermajority rule, then, when the Lieutenant Governor abolished the rule for redistricting legislation, by another quorum-busting flight, this time by Senate Democrats to Albuquerque, New Mexico. Travis J.S. App. 62a-63a; Tr., Dec. 15, 2003, 8:30 a.m. (Sen. Ratliff), at 7-8; Tr., Dec. 17, 2003, 1:00 p.m. (Sen. West), at 119.[7]

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[5] This was the first time Republicans had taken a House majority since the 19th century. Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 194.

[6] The legislature is barred by the state constitution from a similar voluntary undertaking for state House and Senate seats. The Texas Constitution establishes a mechanism that forces completion of redistricting for those bodies between the time of release of the federal census data and the first election afterwards. *See* TEX. CONST. Art. III, § 28; *see also Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971) (interpreting Article III, § 28 to make redistricting action mandatory).

[7] The Court summarily affirmed a district court judgment that rejected a challenge under Section 5 of the Voting Rights Act, 42 U.S.C.

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The new majority prevailed in the third called session. On October 12, 2003, the legislature enacted legislation creating a new statewide redistricting map, known as Plan 1374C, for Texas congressional seats. Plan 1374C was to immediately replace the *Balderas* Plan 1151C and be used in the upcoming 2004 elections. As the district court explained, Plan 1374C's "single-minded purpose" was "to gain partisan advantage." Travis J.S. App. 89a.

The new redistricting plan used the uncorrected population count from the 2000 census to meet the constitutional requirement of equipopulous districts.[8] Despite the fact that those numbers had issued nearly three years earlier, the state admitted that it "did not make any effort to determine the current populations of the congressional districts." Stip. 85.

The reality was that there had been huge changes in the size and dispersion of Texas population between the spring 2001 release of official census data for redistricting and Plan 1374C's enactment. Undisputed trial evidence established that "rapid and spatially uneven population surges and declines" made the census's 2000 block-level population data "old and specious" both statewide and in local communities. J.A. 170.[9] More than a million people had been added to the Texas population in the interim. *Id.*

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§ 1973c, to the Lieutenant Governor's abolition of the Senate's two-thirds rule. *Barrientos v. Texas*, 541 U.S. 984 (2004), *aff'g*, 290 F.Supp.2d 740 (S.D. Tex. 2003).

[8] The Census Bureau had officially corrected the 2000 census and added thirty people to Texas' total population before Plan 1374C was enacted. *See* Travis County/City of Austin Exh. 2.

[9] This is the testimony of Ryan Robinson, the City of Austin's official demographer. His declaration was admitted without objection as Travis County/City of Austin Exh. 1. The state never offered any contrary evidence, either at the 2003 trial or on remand. Even with the heightened attention the district court devoted to the equal population issue on remand, the state insisted that the evidentiary record had been fully developed. Tr., Jan. 21, 2005, at 123, 140-142.

And the rapidly rising Hispanic share of the population meant that Plan 1374C districts were drawn that "do not fully reflect the current size and spatial scope of the state's largest and most rapidly expanding minority community[.]" J.A. 171. The result of all this growth and its uneven spread was that, in actuality, Plan 1374C's use of 2000 census block data left the "resultant districts . . . not balanced with each other in terms of population." J.A. 172.[10]

Nevertheless, the state used the 2000 numbers – but only for meeting one person, one vote requirements. The chief staffer who drew redistricting maps for the Lieutenant Governor and the Senate testified that he thought it was "silly" in a state as big as Texas to assume that populations had not shifted between the 2000 census and the drawing of Plan 1374C. Tr., Dec. 18, 2003, 1:00 p.m. (Bob Davis), at 221.[11]

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[10] The Robinson testimony is largely qualitative. The Office of the State Demographer for Texas, through the website of the Texas State Data Center, has posted quantitative estimates that bear out Robinson's conclusions. These estimates show that by October 2003, when Plan 1374C was enacted, Texas's population had increased by 1,165,091 since the 2000 census count. The growth was uneven. The county with the largest estimated population loss in the three-year period, Dawson, dropped by 850 people, while the county with the largest gain, Harris, increased by 182,194. Webb County, home to the City of Laredo whose split in Plan 1374C precipitated a heated voting rights dispute about Congressional District 23, had grown by nearly 20,000. Twelve counties, many of them at the center of the legislature's partisan line-drawing disputes, had grown by more than 25,000 people in the three-year period. These estimates are in Table 1 of the "Estimates of the Total Populations of Counties and Places in Texas for July 1, 2002 and January 1, 2003" from the Texas State Data Center's Texas State Population Estimates and Projections Program (Oct. 2003). *See* http://txsdc.utsa.edu/download/pdf/estimates/2002_txpopest_county.pdf (Texas State Data Center website).

[11] This witness for the state also testified: "Well, far be it from me to suggest that the Supreme Court of the United States hasn't given us

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The on-the-ground political decisions about where Plan 1374C's lines would be drawn sprang from a quite different source and time. The political, electoral, and demographic realities of 2003 guided virtually every step of the actual line-drawing. According to the Senate's chief redistricting staffer, the overall objective of the 2003 redistricting effort was to increase the number of Republicans "to more accurately reflect the voting trends in the State" and that "we used election results" to accomplish the partisan ends. Tr., Dec. 18, 2003, 8:30 a.m. (Bob Davis), at 25, 121. The more-than-three-year-old census numbers were brought off the shelf for use only at the margins, to "zero out" the districts for equal population purposes. J.A. 268-270.

The use of post-2000 political realities pervaded the legislative remapping endeavor. Members of the legislature, intimately familiar with post-2000 demographic shifts in their districts, instructed Mr. Davis about precisely where many of the plan's lines should be. Tr., Dec. 18, 2003, 8:30 a.m. (Bob Davis), at 4-5, 9. These legislators were acutely aware of 2002 election results and voting trends; the statistical software on the redistricting computers included a comprehensive statewide compilation of 2002 election results. *See, e.g.*, State Exh. 23; Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 185.

The House side was no different in this regard. Representative King was the House sponsor of the redistricting bill and led its map-drawing effort. Travis J.S. App. 93a, 171a. At trial, he explained about his concerns during the mapping effort over whether the new configuration of Congressional District 4 would fall into the Republican column in the 2004 election. He explained that he had designed it so that the population growth he was seeing

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a proper definition when it says that you use the census numbers for all 10 years of the biennium. And if you're asking is that – does that comport with reality, I will have to let you answer that question." Tr., Dec. 18, 2003, 1:00 p.m. (Bob Davis), at 216.

there would let it "grow into" a Republican district over the decade. Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 176-177 ("Grayson and Collin Counties are fast-growing Republican areas"); Travis J.S. App. 52a. Closer to his home political base in Wise and Parker Counties, Representative King characterized new Congressional District 12 as the product of an effort to take advantage of quite recent trends in population shifts from nearby Denton and Tarrant Counties. J.A. 282-283. He also recalled another member's concerns during the legislative process about an area "becoming so Hispanic" that it might threaten the integrity of Congressional District 30. Tr., Dec. 18, 2003, 1:00 p.m. (Rep. King), at 195-196.

Congressional District 23 is a prime example of the incongruity between, on the one hand, the calculations for meeting the constitutional command of one person, one vote and, on the other, the calculations for satisfying the underlying political objectives that drove the legislative effort in the first place. District 23, stretching along the Texas-Mexico border for hundreds of miles between Laredo in the east and El Paso to the west, while reaching into the San Antonio suburbs further north, had been a Republican district since at least 1992 when its incumbent, Congressman Bonilla, had first been elected. Travis J.S. App. 126a. Under Plan 1374C, District 23 had not performed consistently as a Hispanic opportunity district despite having a bare majority of Hispanic citizen voting age population. Travis J.S. App. 126a. Yet, by 2003, spurred by booming Hispanic population growth, J.A. 285, District 23 "was moving in th[e] direction" of becoming an effective Hispanic opportunity district. Travis J.S. App. 128a. Bending to what population growth was doing to the partisan make-up of the district drawn by the court, and in order to protect Congressman Bonilla, Plan 1374C split off several hundred thousand Hispanic voters from the 2001 version of the district and "prevented it from continuing to move toward becoming an effective opportunity

district." Travis J.S. App. 142a, 166a. In other words, using 2002 election data and contemporary understandings of population trends – but using 2000 population numbers to satisfy constitutional demands – Plan 1374C terminated District 23 as an "evolving Hispanic influence district." Travis J.S. App. 167a n.201.

C. The 2003 pre-remand decision

At the case's inception in 2003, the Travis County appellants, joined by voters from sixteen other Plan 1374C districts, challenged Plan 1374C as violating the constitutional command of one person, one vote. Joint Final Pretrial Order ¶¶ D.10(a), D.1(h); Stip. 7-41.[12] The 2003 decision, however, completely ignores the issue; there is no mention whatever of it. Even as the district court disregarded the equal population issue, and decried a judicial incapacity to tackle excessive partisan gerrymandering of the Plan 1374C sort, it acknowledged that the "most compelling arguments" against mid-cycle redistricting arise from the "impropriety . . . of frequent redistricting" and mused about the desirability of judicial limitations that focus on the "time and circumstance of partisan linedrawing." Travis J.S. App. 84a, 98a.

D. The 2004 post-remand decision

After this Court vacated the 2003 judgment and remanded the case, however, the district court did address the issue, dividing 2-1 over whether a violation had been established.[13] It summarized the equal population

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[12] Voters raising the one person, one vote issue reside in the following Plan 1374C districts: 1, 2, 6, 8, 10, 11, 14, 15, 17, 19, 21, 23, 25, 26, 28, 29, and 30.

[13] Instead of dissenting, Judge Ward, who concluded that Plan 1374C violates the constitutional command of one person, one vote, nonetheless only specially concurred, because of concern that the equal population issue was not within the scope of the remand. Travis J.S.

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challenge: "[D]ilution of the powerful command of one-person, one vote should not be allowed when redistricting is not required by law." Travis J.S. App. 35a.

The district court majority found this equal population argument "a more plausible contention" than the partisan gerrymandering claim, termed it "seductive," and viewed the argument as an invitation to apply "established doctrine in a novel way." Travis J.S. App. 3a, 41a. Ultimately, the majority did not so much reject the one person, one vote argument as exercise discretion not to adopt it. *See, e.g.*, Travis J.S. App. 42a ("we . . . decline to adopt" the rule); *see also id.*, at 3a ("not persuaded that it is appropriate").[14]

The majority gave three reasons for its hesitation. It sensed a tension with the principle that legislatures are free to replace court-ordered plans with their own legislative plans. Travis J.S. App. 37a-38a. It questioned why the argument should be adopted if a legislative plan adopted in 2003 using 2000 census data is no less equipopulous than a court plan ordered in 2001 using 2000 census data. *Id.* 39a. Finally, it pondered whether more frequent redistricting might become the norm or legal expectation if, as the special concurrence suggested, there were avenues for obtaining reliable, current population data for redistricting. *Id.* 40a.

App. 58a. The majority was uncertain on this point. Travis J.S. App. 41a-42a. Any question about whether the scope of the remand extended to the one person, one vote issue is irrelevant to this appeal by the Travis County appellants and the voters who joined with them on this issue from the beginning of the case because they presented the issue to this Court in the first, pre-remand appeal, too. LULAC raised the same challenge on remand.

[14] In a similar vein, at oral argument on remand, one member of the majority, Judge Higginbotham, said that his "reluctance" on the issue "has to do with . . . what should an inferior court do with this argument at this juncture." Tr., Jan. 21, 2005, at 122.

Judge Ward in his special concurrence explains why he would adopt the one person, one vote argument. Travis J.S. App. 47a-56a. He characterizes the proposed constitutional rule somewhat differently than the majority: "The rule ... would require the State to demonstrate that a [voluntary] new redistricting plan does not worsen any population deviations existing among the current districts, denying the benefit of the fiction that the population reflected by the census remains accurate throughout the decade." *Id.* 48a.

Judge Ward expresses concern that, without the rule, and by "incorporating data from election cycles which postdate the most recent census data," states under the control of a single political party may engage in frequent, finetuned gerrymanders "at the expense of the constitutional promise of one-person, one-vote." *Id.* 48a. He discounts the majority's concern that accepting the rule might lead to more frequent redistricting, pointing out that the choice in that regard is political, not legal. *Id.* 49a-50a. He concludes that requiring use of current population figures for voluntary, mid-cycle redistricting to replace a valid plan would be a "structural brake" on partisan gerrymandering. *Id.* 50a. He explains that, while it is the state's burden to make a good faith effort toward equal population, such avenues as special statewide censuses might be available to the state to satisfy that burden if the need to redistrict is sufficiently compelling in a political sense. *Id.* 51a, 53a-55a. Finally, he concludes that the protection afforded legislatures using census data to satisfy the equal population rule should not automatically be extended "to state legislatures which voluntarily embark on the task of redistricting for partisan political purposes." *Id.* 56a.

SUMMARY OF ARGUMENT

Texas's brazen redistricting unmistakably confirms that state legislatures have diminished the venerable one person, one vote principle to little more than a constitutional nuisance. The Court should seize this opportunity to

reinstate the equal population doctrine as a rigorous constitutional principle, providing a judicially manageable standard to check the worst excesses of modern partisan gerrymandering.

The Court's quandary in *Vieth* about whether there is a constitutional firewall that protects the people from overt and excessive partisan gerrymanders arises from the problem of discerning judicially manageable standards to evaluate how much is too much politics in the politically charged world of congressional redistricting. For at least one species of partisan gerrymandering, the constitutional bulwark is readily at hand, with objective standards that channel the judicial inquiry away from determining where along the political continuum state legislatures may have crossed the line of acceptable behavior.

The species of partisan gerrymandering is judicially unforced, voluntary redistricting after the first post-census congressional election cycle directed at increasing one political party's position among the state's congressional delegation. The constitutional principle that provides the judicially manageable standard is the stringent constitutional requirement that congressional districts are to be, as nearly as practicable, equal in population.

The Texas legislature's pioneering pursuit and passage of Plan 1374C in the fall of 2003 was uncoerced by the judiciary and unnecessary under the state's constitution. It was bred of pure partisanship. And, it displayed a remarkable indifference to the constitutional requirement of one person, one vote while simultaneously pulsating with an acute sensitivity and concern for up-to-the-minute politics, election results, and the local implications of demographic shifts. Plan 1374C was fashioned for the representatives, not the people they represent.

Texas's rapid population growth of the 1990s, which yielded two new congressional seats in the 2000 apportionment, continued into the new decade. It was especially pronounced in the surging proportion of the Texas population that is Hispanic. Yet, the same legislature

that insisted on current election data and statistics to support its partisan objective of significantly enhancing the Republican Party's position in the Texas congressional delegation was content to meet its constitutional duty of providing equal representation to the people by using three-year-old census data. It was plain to anyone who cared to notice that this official population data no longer painted an accurate picture of the dispersal of Texas's population. Nonetheless, the legislature used it, admitting that it made no attempt whatever to update it.

Accepting the state's approach in Plan 1374C to meeting its constitutional duty to ensure equal representation of its population in Congress would trivialize one of the grand principles of modern constitutional jurisprudence. It would reduce the one person, one vote rule to little more than a method for correcting rounding errors.

The state's only defense to failing to undertake a good faith effort to equalize actual population is a legal fiction: that official decennial census population data remains valid for the full decade for purposes of the constitutional rule of equipopulous districts. Permitting the state a safe constitutional harbor in this context, though, would be a perversion of the very reason the fiction was created. It was created to relieve states of the obligation to endlessly redistrict as it faced the Sisyphean task of re-balancing district populations to keep up with a mobile society. The state invokes the fiction here for precisely the opposite reason: to free it to redistrict as frequently as partisans wish without having to worry about what has happened to the population balance.

The Court should not extend the protection of the legal fiction of inter-censal population stability to insulate a state wishing to redistrict its congressional seats midway through the census cycle for no reason other than partisan gain. Conforming the fiction to the reasons for its creation would reinvigorate the prime directive of redistricting.

In *Reynolds v. Sims*, the Court established a congruity between the need for periodic redistricting and planned, periodic state adjustments to population dispersal data. In this first detailed exploration of the one person, one vote rule, the Court molded the constitutional command to fit the realities of population dynamics, explaining that the constitutional rule does not require "daily, monthly, annual or biennial" redistricting. Yet, to receive this respite, the state had to have a "reasonably conceived plan" for periodic adjustment of population balances among districts. 377 U.S. at 593.

This is an old-fashioned violation of the strict one person, one vote rule, subordinating the bedrock principle to a brash effort to maximize partisan advantage in the United States House of Representatives. The Court should hold that Plan 1374C violates Article I, Section 2, of the United States Constitution.

ARGUMENT

The Texas legislature's voluntary replacement in 2003 of a legally validated plan with a statewide congressional redistricting plan, relying only on 2000 census data to satisfy the strict equal population rule, is invalid because it is not the product of a good faith effort to create equipopulous districts.

I. Plan 1374C's approach to the constitutional requirement of one person, one vote clashes with the Great Compromise's design of the United States House of Representatives as the legislative body most sensitive to the electorate.

The origins of the one person, one vote constitutional command for congressional districts lie in the Great Compromise by the Framers of our Constitution, which set

the rules for our bicameral system of legislative government. One of the two pillars of this historic agreement about democratic governance – Article I, Section 2, of the Constitution, and its requirement that members of the United States House of Representatives be chosen "by the People of the several States" – is the source of this Court's holding that there must be "equal representation in the House for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964).

By urging constitutional validation of Plan 1374C's indifference to a robust equal population rule, the state is seeking dispensation to separate the political configuration of the House of Representatives from the people who are supposed to elect its members and be represented by them. The state has determined that, while under no legal compulsion, it nonetheless can reconfigure congressional districts midway through decennial census cycles for purely partisan reasons by using up-to-the-minute demographic and political knowledge to achieve political objectives for the elected, but using stale census data to discharge its constitutional duty of equality for the electors.[15] Judicially validating this incongruity principle would further attenuate the link between the people and the members of their House of Representatives and severely erode the foundation of the Great Compromise.

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[15] The state even agrees that its treatment of the exacting one person, one vote rule would authorize the redrawing of congressional lines in the ninth year of the decade, using population data from the beginning of that decade to satisfy the constitutional command of equality nine years later. Tr., Jan. 21, 2005, at 137-138 ("they could do it in the ninth year"). Under the state's theory, the Louisiana legislature would meet the one person, one vote requirement today if it redistricted all the state's congressional districts but ignored (for constitutional but not political purposes) the population displacements caused by Hurricane Katrina and, instead, assumed for Article I, Section 2 purposes that all the people who have permanently shifted their residence were still where they had been when the 2000 census was taken.

The Travis County appellants urge the Court not to let the state of Texas get away with it.

Today for politicians and political parties, yesterday for the people, should not become a redistricting rallying cry for those holding the reins of state legislative power. The jurisprudential era inaugurated by *Baker v. Carr*, 369 U.S. 186 (1962), led to the break-up of encrustations of political power caused by too infrequent redistrictings. In this case, the principles of *Baker v. Carr* and its progeny should be deployed to prevent similar encrustations of political power, this time from too frequent redistrictings.

II. The districts in Plan 1374C are not, "as nearly as practicable," equal in population and do not reflect a "good faith" state effort to achieve population equality.

A. The equal population rule only permits population variations among congressional districts that are unavoidable and the product of a good faith effort to achieve precise equality.

Wesberry laid down the basic rule, one that still guides constitutional evaluation of congressional redistricting plans: "[T]he command of Article I, § 2 . . . means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. at 7-8. There, the Court was firm that there is no constitutional room for "unnecessarily" abridging the right. 376 U.S. at 17.

The Court further fleshed out the "as nearly as practicable" standard in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). There, the Court explained that the practicability standard rejects the idea of fixed numerical standards, but requires attention to the circumstances of each case. 394 U.S. at 530. For congressional districts, the practicability standard requires the state to make a "good-faith effort" to

achieve precise mathematical equality. *Id.* at 530-531. If there are variances from the constitutional command of equal population among districts, the state must demonstrate either: (a) that it made a good faith effort to avoid the variances but unavoidably ended up with them; or (b) that it has adequate justification for the variances. *Id.* at 531. The burden is the state's. *Id.*

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court held that challengers to the redistricting bear the burden of establishing that population variations among the districts were avoidable and not the result of a "good faith" effort by the state to achieve equality. The burden then shifts to the state to prove that each variance was "necessary to achieve some legitimate goal" of the state. 462 U.S. at 730-731.[16] The Court determined that New Jersey's congressional redistricting failed the one person, one vote test, not because it did not achieve strict mathematical equality, but because the legislature had made "no serious attempt" to find ways to equalize the districts below the fixed percentage variation – small as it was – that it had used as the termination point for equalization efforts. *Id.* at 731 n.3.

The Court in *Karcher* flatly rejects the proposition that purely political considerations can justify population deviations. *Id.* at 739. The Court does not reject political considerations as an acceptable and integral part of the redistricting process; it simply requires that they cannot

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[16] Between *Kirkpatrick v. Preisler* and *Karcher v. Daggett*, the Court clarified that states have "broader latitude" to meet the constitutional standard of equal population in state legislative redistricting than in congressional redistricting. *See Mahan v. Howell*, 410 U.S. 315, 322 (1973). Thus, the requirement of equal population applicable to Plan 1374C is at its most stringent, with "population alone . . . the sole criterion of constitutionality[.]" *Id.*

be pursued in a way that relegates population equality to the back seat. *Id.*[17]

B. The state did not carry its burden of establishing that the population variances among Plan 1374C's districts, occasioned by the passage of time and the uneven movement of people, are necessary to achieve a legitimate state goal.

The state failed to meet the *Wesberry-Preisler-Karcher* standard in Plan 1374C. If ever there were a redistricting that "unnecessarily" abridges the right of one person, one vote, Plan 1374C is it. In pursuing its political objectives, and in doing so when there was no legal compulsion, the state was utterly indifferent to achieving population equality as nearly as was practicable. Equality was an afterthought. Not only did the state make "no serious attempt" to find ways to equalize the districts based on population; it admits that it made no attempt at all to update the 2000 census numbers that it, along with everyone else, knows were terribly stale by the time the state decided to fire up its redistricting engines.

The Travis County appellants met their initial burden under *Karcher*. True enough, they did not commission a new statewide census that they then could compare with the 2000 census numbers and introduce at trial.[18] But that

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[17] "We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases . . . in which the State bears the burden of justifying the differences with particularity." 462 U.S. at 739.

[18] Practically speaking, and money aside, there would have been no time do that in any event. Plan 1374C was passed and signed into law in mid-October, less than two months before the opening of the candidate

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is not required by the burden-shifting rules of *Karcher*. The factually unrebutted Robinson Declaration established that the population shifts across Texas between the time of the 2000 census and Plan 1374C's passage were significant, especially for the burgeoning Hispanic population, and unevenly distributed across the regions of the state. The state's undertaking of the effort at all was transparently avoidable, especially since Plan 1151C was valid for the decade and the legislature had been formally instructed by the Texas Attorney General that there was not any legal need for legislative action. Finally, against this backdrop, the state admitted that it made no effort whatever to achieve equality among the districts, resting instead on what it well knew were census numbers that no longer reflected the distributional reality of the Texas population.

Under *Karcher*, these factual circumstances meant that the burden shifted to the state to prove that the population variances among Plan 1374C's districts was "necessary" to achieve a "legitimate goal" of the state. *Karcher*, 462 U.S. at 731. The state made no real effort to meet its burden in a factual sense. That is, it did not argue that the facts established that relying on the 2000 census in late 2003, even while aware that the census numbers reflected only a past reality, was necessitated by its announced goal of increasing the number of seats for Republicans. Instead, the state's defense to the one person, one vote claim is based on legal arguments. None of them, though, help the state evade the fact that its redistricting did not meet the exacting population equality rule of *Karcher*.

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filing period for congressional seats. The lawsuit was filed immediately upon the bill's passage. J.A. 1. Trial ended before Christmas.

C. The state cannot claim the safe harbor protection of the legal fiction of inter-censal population stasis when it voluntarily separates redistricting from a plan for adjusting population balances to meet the Constitution's equal population requirement.

The state's principal defense against the one person, one vote challenge is the legal fiction that the official census numbers remain accurate and valid throughout the decade. This fiction, argues the state, means that use of the 2000 census population numbers to meet the requirement of equipopulous districts provides the state a safe constitutional harbor from one person, one vote challenges, even if the actual facts are that population equality is not achieved by the mid-cycle redistricting plan. Accepting the state's argument, and applying the legal fiction to validate Plan 1374C's one person, one vote *bona fides*, is unwarranted and would pervert the very reason for the fiction.

The legal fiction of inter-censal population stasis was borne of necessity in the redistricting context. The Court has not been oblivious to real-world events in this regard. It is well aware that "[d]istrict populations are constantly changing, often at different rates in either direction, up or down." *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973). Nonetheless, the Court has concluded that, once a state's post-census redistricting is accomplished to account for population shifts and changes, the state may "operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

The reason for the fiction is obvious: to avoid the necessity of constant redistricting to satisfy the equal population rule. In its first delineation of the one person, one vote rule, the Court explained that the constitutional command was not meant to require "daily, monthly,

annual or biennial" redistricting – as long as a state has a "reasonably conceived plan" for periodic readjustment. *Reynolds v. Sims*, 377 U.S. 533, 593 (1964).

The legal fiction is unassailably justified, but only when the reason for its creation matches the circumstance of its application.[19] The problem in using the fiction in this case is two-fold. First, the state invokes the fiction to further a redistricting practice that is the polar opposite of the reason for the fiction. If the state's argument is accepted, and the fiction applied to uphold Plan 1374C, then the fiction is being used to protect redistricting as frequently as a state desires. *Reynolds v. Sims* realized the need for a shield for the states to avoid unending redistricting, and the fiction was created to provide that shield. Neither *Reynolds* nor any of its progeny, though, ever authorized the states to duck behind the fiction so that they could redistrict as frequently as partisans wish in order to stay one step ahead of the voters.

The second problem with protecting the state with the fiction in this case is that Plan 1374C betrays any conception that, as *Reynolds* required, Texas has a "reasonably conceived plan" for periodic adjustment of the population balances in its districts. The state had never before undertaken a statewide redistricting in the absence of new official census numbers or judicial invalidation of a legislatively enacted plan. *Reynolds*, by recognizing that the one

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[19] Particularly pertinent in this context is Justice Frankfurter's observation for the Court that "especially in the disposition of constitutional issues are legal fictions hazardous[.]" *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948). The Court is careful about when to deploy a legal fiction and when not to. For example, in a non-constitutional context, the Court disregarded a legal fiction when it was invoked in a context that would result in "patent injustice." *Safe Deposit & Trust Co. of Baltimore v. Commonwealth of Virginia*, 280 U.S. 83, 92 (1929).

person, one vote rule does not require repeated redistrictings *if* there is a reasonable state plan for periodic adjustment of population balances, links the two pieces of the equal population puzzle. It says in effect that, under the constitutional rule of equal population, the periodic adjustment of population balances is coupled with redistricting. One cannot happen without the other – at least, when it concerns voluntary redistricting undertakings by the state.[20]

Here, though, the state uncoupled the adjustment of population balances from redistricting. It redistricted *without* adjusting the population balances. The Court in *Reynolds*, while perhaps not foreseeing the kind of unprecedented effort leading to Plan 1374C, did forewarn states that they cannot willy-nilly separate population accuracy adjustments from the political imperatives that lead to redistricting and still survive one person, one vote scrutiny.

D. The partisanship that drove Plan 1374C's passage is not a legitimate state goal justifying the undoubted variances of the districts from population equality.

The "single-minded purpose" of furthering partisan objectives and enhancing one political party's standing at

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[20] *Reynolds*, being the first in the line of one person, one vote decisions, was addressing voluntary legislative redistricting action by the states. Only later, as courts came to apply the doctrine and its offspring to invalidate state redistricting actions, did the issue arise of what data should be used for legislative redistrictings in response to judicial invalidation. *Kirkpatrick v. Preisler*, for example, considered a late-decade legislative remap effort that used beginning-of-decade census data to replace an existing legislative plan found to be unconstitutional. In that circumstance, the necessity for action justifies use of the legal fiction that the census figures remain accurate through the decade. In this case, however, Texas is not responding to judicial invalidation of one of its redistricting plans. Plan 1374C was a wholly voluntary undertaking.

the expense of another's was the reason Plan 1374C was pursued and passed. Travis J.S. App. 89a. In *Cox v. Larios*, 542 U.S. 947 (2004), the Court summarily affirmed a district court's holding that achieving partisan aims is not a "good faith basis" for failing to equally balance the population of state legislative districts, even when the departure from equality lies within a commonly acceptable range of difference. *See Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004) (3-judge court) (holding that deviation of 9.98% among legislative districts violates one person, one vote requirement when partisan objectives drove the drawing of lines within the range of variation). On the same reasoning, the Court should hold in this case that the partisan purposes that drove Plan 1374C's passage do not constitute a good faith basis for the plan's undisputed departure from strict population equality among the districts.

1. The opinions in *Vieth* establish that unbridled partisanship is not a legitimate governmental goal in redistricting.

While the Court failed to deliver a majority opinion in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the members of the Court seemed to find common ground in the proposition that pursuit of purely partisan objectives in congressional redistricting is not, by itself, a valid governmental goal. The plurality opinion for four members of the Court expressed no disagreement with the conclusion that partisan gerrymanders are incompatible with democratic principles. 541 U.S. at 292 (J. Scalia, joined by Ch. J. Rehnquist and J. O'Connor and J. Thomas). Four members of the Court, in three dissenting opinions, found constitutional infirmities in a partisan gerrymander. 541 U.S. at 317-342 (J. Stevens, dissenting); at 343-355 (J. Souter, dissenting, joined by J. Ginsburg); and at 355-368 (J. Breyer, dissenting). The remaining member of the

Court concurred in the plurality's judgment and also found disfavor with the partisan gerrymanders as a legitimate end of government if they are directed at disadvantaging one party. 431 U.S. at 316 (J. Kennedy, concurring). Justice Kennedy demurred, however, from the plurality opinion's conclusion that partisan gerrymander claims should be non-justiciable because there are no manageable judicial standards to evaluate them. He declined to bar judicial redress for "all future claims of injury from a partisan gerrymander." 541 U.S. at 309 (J. Kennedy, concurring).[21]

Later, concurring in the Court's first post-*Vieth* disposition of a redistricting case raising partisan gerrymander questions, Justice Stevens, joined by Justice Breyer, highlighted one well-established constitutional ground for addressing claims of injury from partisan gerrymanders. There, they explained that, after the splintered decision in *Vieth*, the equal population rule is the "only clear limitation" remaining for improper redistricting practices and cautioned that "we must be careful not to dilute its strength." *Cox v. Larios*, 542 U.S. at 949-950.

Together, *Vieth*'s several opinions and the *Cox v. Larios* concurrence establish that, regardless of the constitutional validity and justiciability of partisan gerrymander claims *vel non*, pure partisan gerrymanders cannot be treated as legitimate governmental objectives justifying departures from the strict constitutional rule of one person, one vote. Hence, the state cannot justify its failure to make a good faith effort to actually equalize population

---

[21] Justice Kennedy cited with approval this remarkably prescient conclusion from the seminal one person, one vote ruling in *Reynolds v. Sims*: "[A] legislature's reliance on other apportionment interests is invalid arbitrary and capricious action if it leads to unequal populations among districts." *Vieth*, 541 U.S. at 310-311, citing *Reynolds*, 377 U.S. at 565-568.

among Plan 1374C's districts by pointing to the abstract legitimacy of state legislative action to redistrict its congressional seats. There was no abstract principle of state legislative authority behind Plan 1374C. The concrete principle the state sought to further was pure partisanship – and that is not a legitimate governmental justification for failing to make a good faith effort to achieve population equality among the districts.

2. Failing to meet the one person, one vote requirement cannot be justified by the claim that Plan 1374C is nothing more than a correction for past partisan gerrymanders.

The state cannot justify its disregard for the one person, one vote requirement by arguing that Plan 1374C is nothing more than a corrective action to overcome past partisan gerrymanders when another party controlled the levers of state government. First, the premise is far from established, resting on little more than anecdotal observations. While the district court majority gave some credence to the argument that the 2003 Republican gerrymander merely supplanted the lingering effects of a 2001 Democratic gerrymander, *see* Travis J.S. App. 21a-24a, 26a-27a, the federal district court that heard the gerrymander claim against the 1991 Texas congressional plan concluded that it was not an illegal gerrymander. *See Terrazas v. Slagle*, 821 F.Supp. 1162, 1172-1175 (W.D. Tex. 1993) (3-judge court), cited in *Vieth v. Jubelirer*, 541 U.S. at 280 n.6.[22]

More fundamentally, though, a desire to tackle and undo actual partisan grievances cannot justify the government's disregard of the one person, one vote rule. "Problems created by partisan politics cannot justify an

[22] *Davis v. Bandemer*, 478 U.S. 109 (1986), guided disposition of the *Terrazas* case.

apportionment which does not otherwise pass constitutional muster." *Kirkpatrick v. Preisler*, 394 U.S. at 533. Furthermore, the Court has held that the constitutional requirement of one person, one vote requires equalization of population, not equalization of political power. *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 697-698, 703 (1989).[23]

So, partisanship, whether as a corrective or as a pure power play, does not absolve the state from complying with the equal population rule and cannot be used to justify the failure to make a good faith effort to provide a current equalization of populations among the districts in Plan 1374C.

III. The concerns of the district court majority do not justify relieving the state from strict compliance with the one person, one vote requirement.

A. The federalism principle that legislative bodies must be given the opportunity to respond to judicial invalidation of redistricting plans is inapplicable in this situation.

The district court was of the view that refusing to indulge the legal fiction of inter-censal population stability to protect the Texas legislature's 2003 redistricting was vaguely at odds with the federalism principle that allows legislatures an opportunity to craft their own solutions to legal faults found in their legislative redistricting efforts. The Court has held that, where there is time, a court invalidating a legislative districting plan should give the state an opportunity to come up with its own solution to

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[23] Similarly, Justice O'Connor observed that "the one person, one vote principle safeguards the individual's right to vote, not the interests of political parties." *Davis v. Bandemer*, 478 U.S. at 149 (J. O'Connor, concurring).

the legal problem. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion).

Those principles do not even remotely apply to this case. This is not a situation in which the state enacted a redistricting plan that was later found by a federal court to have legal flaws. Texas did not enact any plan at all in 2001 in the wake of congressional reapportionment and release of the 2000 census. Even then, the *Balderas* court stayed its hand as long as possible to give the state judicial system a chance to devise a congressional plan. *See* Travis J.S. App. 215a (explaining that the deferral mandated by *Growe v. Emison*, 507 U.S. 25 (1993), had ended without timely state court action). In the end, the *Balderas* court devised Plan 1151C in the wake of total inaction by the state. There was nothing for the state to correct in response to Plan 1151C because the state had done nothing in the first place.

Moreover, the state positively endorsed Plan 1151C. Once the plan was published by the *Balderas* court, the state accepted it. The state not only did not appeal the *Balderas* judgment to this Court, it asked that the judgment be affirmed. In this situation, the federalism principle of equitable deference is inapplicable.

B. Whether population equality in 2003 is greater, less, or the same under Plan 1151C as compared to Plan 1374C is irrelevant to the constitutional requirement that the Texas legislature is obligated to satisfy.

The district court majority first assumed that the population balance among the districts was as much out of kilter in 2003 under Plan 1151C as under Plan 1374C. Then, on that assumption, it questioned whether the one person, one vote rule advocated by the Travis County appellants and others could be applied to the state's plan.

There is no evidence to support the district court majority's assumption. After the Travis County appellants introduced unrefuted evidence that the actual population balance among Plan 1374C's districts was not equal, it became the state's burden to establish some other basis on which its plan could be said to meet the one person, one vote rule. It offered nothing – and it made no effort to demonstrate that Plan 1151C and Plan 1374C were equivalent in their population disequilibrium. The one certain thing on this point is that Plan 1374C *never* met the equal population requirement, whereas Plan 1151C did – and, had the legislature not supplanted it with Plan 1374C, still would through operation of the legal fiction that should be unavailable to the state's plan.

At bottom, the district court majority's concern on this score begs the question of whether the legal fiction should be applied to protect the state's 2003 redistricting from constitutional attack on equal population grounds. The legal fiction developed to protect state legislatures, not federal courts, from the Sisyphean task of continual redistricting in response to the dynamics of continual population shifts. The central question is whether the Texas legislature can claim the legal fiction's protection in the circumstances of this case, not whether the underlying population realities are different for the court-crafted plan than they are for the legislatively-crafted one. Under the argument here, the court-crafted plan remains safe under the fiction's umbrella; the legislative plan never was.

C. Lifting the fiction would not create a perverse constitutional pressure for more frequent redistrictings.

The concurring judge observed that, unlike a rigid prohibition on mid-cycle redistricting, the one person, one vote rule would not create a constitutional straightjacket for state legislatures. He saw them as free to redistrict congressional seats in mid-cycle as long as they could come

up with population data of a sufficiently robust sort. Travis J.S. App. 51a, 53a-55a. In reaction, the majority questioned whether this approach might not open up state legislatures that chose not to redistrict in mid-cycle to claims that they were constitutionally compelled to undertake such redistricting. *Id.* 40a.

This concern is a red-herring. There is a federal statutory requirement of a mid-decade census, but it specifically proscribes the data produced from that particular census from being used to draw congressional districts. 13 U.S.C. §§ 141(d), 141(e)(2). So, there is no threat there of forced mid-cycle redistricting.

Another census provision authorizes the Secretary of Commerce to conduct "special censuses" for states, if the states pay for them. 13 U.S.C. § 196. It does not contain a restriction prohibiting use of the data in congressional redistricting, but it also is clearly permissive, in terms of both the Commerce Department deciding to perform the task and the states deciding to request it. While this may be a vehicle for states that want to voluntarily undertake a mid-cycle congressional redistricting without reliance on earlier population data from the decennial census, it creates no compulsion for the states.

As with the court majority's concern about whether Plan 1151C was just as out of kilter as Plan 1374C in terms of equal district populations, this concern essentially begs the question about the proper operation of the legal fiction at the center of the one person, one vote claim. If the legal fiction insulates otherwise valid congressional redistrictings at the beginning of the decade, before the first round of post-census elections, from later attack for violating the equal population rule as populations inevitably shift, but does not protect voluntary legislative undertakings after that first round of elections, then the majority's concern evaporates.

In the end, notwithstanding concerns of the district court majority, the essential question remains: is the state's voluntary redistricting in 2003 insulated from the

full force of the stringent equal population principle by a legal fiction of inter-censal stability that is designed to avoid the need for frequent redistrictings?

CONCLUSION

The Travis County appellants request the Court to reverse the district court judgment upholding Plan 1374C and order reinstatement of Plan 1151C.[24]

Respectfully submitted,

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January 10, 2006

[24] The district court majority recognized that the "virtually certain result" of acceptance of the one person, one vote argument would be to have upcoming elections conducted under Plan 1151C. Travis J.S. App. 39a.

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Nos. 05-204, 05-254, 05-276, 05-439

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AM. CITIZENS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

TRAVIS COUNTY, TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

EDDIE JACKSON, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

GI FORUM OF TEXAS, ET AL., *Appellants*,
v.
RICK PERRY, ET AL., *Appellees*.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF APPELLEES TINA BENKISER, Chairman, Republican Party of Texas, AND JOHN DeNOYELLES

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PARTIES TO THE PROCEEDING

Appellants in No. 05-276 list Appellee Tina Benkiser and the other parties to the four consolidated cases filed in 2003: *Session v. Perry* (No. 2:03-CV-354) (lead case); *Jackson v. State of Texas* (No. 2:03-CV-356) (consolidated by order of Oct. 23, 2003); *GI Forum of Texas v. State of Texas* (No. 2:03-CV-367) (order of Oct. 27, 2003); and *LULAC v. State of Texas* (No. 2:03-CV-380) (order of Nov. 6, 2003).

The district court also consolidated with *Session v. Perry* three cases filed in 2001, including *Balderas v. State of Texas* (No. 6:01-CV-158) (order of Oct. 23, 2003). Parties to the *Balderas* case include Appellee John DeNoyelles; Emily Amps; John Archer; Rolando Arriola; Associated Republicans of Texas; Atascosa County, Texas; Congressman Joe Barton; Bell County, Texas; Congressman Ken Bentsen; Congressman Kevin Brady; Bonnie Breazeale; Boyce T. Breedlove; David Brown; Tony Campos; Congressman John Culberson; Congressman Tom Delay; Jesse Diaz; Gina Dixon; Pauline Dixon; Bennie Escobar; Denise Escobar; Ed Gonzales; Grayson County, Texas; Vivian Harris; Stephan Leroy Honore; Howard County, Texas; Guy C. Jackson III; Congressman Sam Johnson; Johnson County, Texas; Louis Laster; Ledbetter Neighborhood Association; Dorothy M. Lee; LULAC 4496 of Dallas; Henry Martinez; Ralph McCloud; Mexican-American Legislative Caucus, Texas House of Representatives; Terry Meza; Roy Millner; Michael Moon; Morris Overstreet; Eugene Pack; Dan Pedroza; Raphael Quintanella; George Rios; Margaret P. Rodriguez; Frank D. Sandoval Jr.; Hargie Faye Savoy; Joy Smith; Roy Stanley; Phil Sudan; Texas Farm Bureau Mutual Insurance Company; The Texas Legislative Black Caucus; Alex Vidales Sr.; Dianna Villasana; Charles E. Vinn Sr.; Wichita County, Texas; Molly Woods; Williamson County, Texas; David O. Zambrano; the Attorney General of Texas; the Comptroller of Public Accounts of Texas; and the Texas Land Commissioner.

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SUMMARY OF ARGUMENT

The redistricting plan entered by the three-judge court in 2001 indisputably perpetuated an egregious Democratic gerrymander from the 1990s, thus virtually insuring that the "party with a minority of the popular vote within the State in all likelihood [would retain] a majority of the seats" in the Texas congressional delegation for the second consecutive decade. *Vieth v. Jubelirer*, 541 U.S. 267, 367 (2004) (Breyer, J., dissenting). Although the Pennsylvania Democrats in *Vieth* attacked this situation as a constitutionally impermissible denial of majority rule, *id.* at 271-73 (plurality op.), Texas Democrats now suggest that this situation is constitutionally and statutorily required.[1]

Specifically, they contend that the Texas Legislature's effort to ameliorate this "entrenchment" of a "party that enjoys only minority support" is facially illegitimate because it reflects a purely political desire to "augment the influence" of the majority Republican party by achieving representation roughly commensurate with the level of the party's support in Texas. *Id.* at 360 (Breyer, J., dissenting); Brief of Jackson Appellants ("App. Br.") at 18 n.17. But, while the Constitution does not require redistricting plans to provide roughly proportional representation or majority rule, it most certainly does not prohibit such efforts at political equality, regardless of when this curative effort occurs. Appellants' contention that such ameliorative redistricting is facially impermissible after the first election of the decade makes a mockery of the plain text of the Elections Clause, perverts the limited remedial role of the judiciary in redistricting, and

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[1] Ms. Benkiser, Chairman of the Republican Party of Texas, believes that she should not have been sued as a defendant in this case because the Party was not involved in or responsible for the challenged redistricting, but she has been named as a defendant and appellee in this case and, consequently, files this responsive brief with Mr. DeNoyelles, who had intervened in the district court in 2001 to assert his interests as a voter.

does not rationally serve any norm of equality enshrined in the First or Fourteenth Amendments because it condemns plans that provide "fair and effective representation" under any conception of that term.

Worse still, Appellants contend that the Voting Rights Act's command of equal minority opportunity prevents alteration of one of the worst examples of the brazen 1990s Democratic gerrymander—District 24—solely because the white Democratic representative who drew the district for himself, like virtually all Democrats, enjoys the support of black voters, who comprise 21.4% of the district's voting age population. The notion that Section 2 requires the creation or retention of districts where black voters constitute just over one-fifth of the electorate because they are part of a successful bi-racial coalition which elects a Democrat is irreconcilable with any rational understanding of *minority* vote *dilution*, the language and equal opportunity mandate of the Voting Rights Act, this Court's seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and the bedrock principle that the federal judiciary cannot and should not advance the partisan interests of a particular party merely because most minorities belong to it.

I. THE POLITICAL GERRYMANDERING CLAIMS LACK MERIT

A. Appellants' Proposed Test Is Invalid

Appellants do not and cannot contend that the Texas Legislature's plan would have constituted an unconstitutional gerrymander under any standard articulated by any Justice, if it had been enacted in 2001. *See infra* § I.D. Yet they advance the astounding and quite perverse notion that an otherwise perfectly valid redistricting plan becomes invalid simply because the Texas Legislature acted after the first election of the decade. App. Br. at 30. They contend that the timing of the redistricting renders wholly impermissible a legislature's desire to "augment the influence" of one party *relative* to the pre-existing plan, even

if a legislature's plan *improves* "partisan balance," because an effort to cure a "current map [that] is 'unfair' or 'skewed'" is impermissible "state action aimed solely at altering the partisan outcome of elections." *Id.* at 18 n.17, 27-28. To the contrary, if the Equal Protection and First Amendment rights of voters in a political party are not violated by a plan when used for the first election of the decade, then the same plan cannot possibly violate those rights when used in later elections. That is because adherence to these rights can be adjudged based only on what a plan *does*, not *when* it is used.

1. *First*, there is no rational basis for having the constitutional right of voters to "fair and effective representation," *Vieth*, 541 U.S. at 307-09 (Kennedy, J., concurring), turn on whether the Texas Legislature avoided "one-person, one-vote" liability by enacting a plan before the first election in the decade or, instead, performed its constitutionally prescribed responsibility under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, *after* a plan with population equality had been entered. That is why no Justice has ever suggested that a plan's compliance with equal population mandates is even *relevant* in assessing whether it is an unconstitutional gerrymander. Even those Justices who believe that gerrymandering claims should be assessed principally in terms of whether district lines reflect solely a political purpose acknowledge that a plan's adherence to the "one-person, one-vote rule" should *not* be "one of the traditional criteria that may serve to defeat a claim that a district has been gerrymandered on a [political] basis." *Vieth*, 541 U.S. at 339 n.33 (Stevens, J., dissenting). Indeed, a later-enacted "gerrymander" is in place for *less* time, so would, if truly "unfair," be preferable to one that affects all five of the decade's elections.

More fundamentally, preventing a legislature from redistricting unless it has some "*constitutional obligation*" (App. Br. at 26 (emphasis added)) to cure legal *deficiencies* in a court-drawn plan turns the judicial and legislative roles

in redistricting on their heads. The very text of the Constitution commits the task of federal redistricting to "the *Legislature*," U.S. Const. art. I, § 4, cl. 1 (emphasis added), and a court-drawn plan thus is merely a temporary remedial measure that necessarily loses force upon the enactment of a plan that itself is free of the population inequality defect being remedied. *See, e.g.*, *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("The State remains free to adopt other plans for apportionment, and the present interim plan will remain in effect no longer time than is necessary to adopt a permanent plan.").[2] It is the constitutionally compliant legislative plan, not the constitutionally compliant court plan, that governs.

In short, since it will be a rare case indeed where a court-drawn plan affirmatively *violates* federal or state standards for redistricting, Appellants' proposal is transparently and concededly an effort to impose a *de facto* ban on mid-decade redistricting. *See* App. Br. at 26. For all the reasons the court below correctly rejected (and this Court declined to entertain) Appellants' effort to suggest that Article I somehow prohibits mid-decade redistricting, this Court should reject Appellants' effort to achieve the same result through the back door. There is no reason or constitutional basis to penalize the Texas Legislature for performing its constitutional duty to create congressional districts simply because it has fulfilled that responsibility belatedly.

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[2] *See also Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature."); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804 (1995); *Miller v. Johnson*, 515 U.S. 900, 936 (1995); *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (Elections Clause not only "invests the Legislature with a particular authority" but also "imposes upon it a corresponding duty"); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("unwelcome obligation of the federal court [is] to devise and impose a reapportionment plan *pending later legislative action*") (emphasis added); *cf. Upham v. Seamon*, 456 U.S. 37, 43 (1982) (remedial plan may displace legislative plan only to extent necessary to prevent violation).

Finally, as a purely practical matter, a legislature acting *before* the first election faces essentially the same choice as one acting subsequent to that election: whether to enact its *own* redistricting plan, where "politics" is a factor, rather than accept the politically neutral court plan that will be imposed absent legislative action. Thus, just like legislative plans enacted after the first election, it will be fair to assume that politics played a dispositive role in a legislature's decision to engage in its own politically based redistricting, rather than to allow a neutral plan to be drawn by a court. The Pennsylvania Republicans' decision to draw their own plan in 2001 assuredly was not affected by any concern that elections would be held in malapportioned districts absent such action, so their decision to engage in redistricting was at least as "political" as that of the Texas Legislature here.

2. *Second*, Appellants' proposed "sole purpose" standard does not focus on any legislative purpose remotely relevant to any cognizable constitutional injury. The standard focuses not on a legislature's purpose in configuring a particular district or all districts—but, instead, on a legislature's "reason for taking any action at all" on redistricting. App. Br. at 22. Thus, if the Texas Legislature had provided for redistricting to be performed by a bipartisan commission "solely" because it believed a commission-drawn plan likely would "augment the influence" of the Republican party relative to the prior plan, Appellants' test would invalidate that action *regardless* of the purpose or effect of the lines that the commission ultimately drew. Equal protection analysis, however, focuses exclusively on the purpose of a challenged *classification*—how it categorizes citizens—not a legislature's general purpose in deciding whether to legislate at all. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 645-47 (1993); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979); *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886). Because the only classifications in redistricting legislation are the lines that separate people into different districts, *see Shaw*, 509 U.S. at 646, the only relevant question is whether

those classifications have an impermissible purpose or effect. Thus, as even Appellants implicitly concede, all Justices have recognized that the examination of unconstitutional purpose necessarily "target[s] *maps*" themselves, rather than the legislature's motive for having a legislatively enacted map at all. App. Br. at 23 (citing *Vieth* concurrence) (emphasis added). All proposed standards for examining a legislature's redistricting purpose focus on whether the plan's district *lines* comply with neutral criteria. *See Davis v. Bandemer*, 478 U.S. 109, 165 (1986) (Powell, J., concurring); *Vieth*, 541 U.S. at 321-23 (Stevens, J., dissenting); *id.* at 347-49 (Souter, J., dissenting).

If Appellants' test were refined to focus on the relevant issue—the purpose underlying district lines that classify persons—it would become utterly toothless because no plaintiff could ever complete the Sisyphean task of showing that a legislature *solely* followed politics in derogation of *all* neutral criteria, including contiguity. Here, Appellants do not and cannot contend that the *sole* purpose of every district line statewide in the Texas Legislature's plan was political, since it is clear and undisputed that the plan did create contiguous, equally populated districts, preserved some political subdivisions, and paid attention to the Voting Rights Act. And, of course, it is quite impossible to assess a legislature's purpose for engaging in redistricting without examining *how* it actually redistricted.

3. *Finally*, Appellants' exclusive focus on whether a legislature seeks to alter the *status quo* is inherently misguided because it does not ask whether the disadvantaged party has "fair and effective representation," but only whether that party retains the level of representation provided by the prior plan. The representation provided to the disfavored party by a pre-existing plan plainly is not a constitutional *minimum* which must be provided throughout the decade: There is no nonretrogression principle for political parties analogous to that which Section 5 of the Voting Rights Act creates for racial minorities.

Using the prior plan as the floor for the disfavored party's representation would also condemn plans that provide "fair and effective representation" under any conception of that term. First, Appellants' proposed standard would, contrary to the Court's express holding in *Gaffney v. Cummings*, 412 U.S. 735 (1973), invalidate legislative efforts to augment the majority's political influence for the purpose of "provid[ing] a rough sort of proportional representation" for both major parties—which plainly is a permissible, albeit not mandated, conception of "fair and effective representation." *Id.* at 754; *see also Vieth*, 541 U.S. at 313 (Kennedy, J., concurring) (allegation that legislature "adopted political classifications ... describes no constitutional flaw" under *Gaffney*'s "governing Fourteenth Amendment standard"). And Appellants even concede that their standard would invalidate a legislature's effort to clearly *enhance* "fair and effective representation" by correcting a plan that is unfairly "skewed" against one party because of a prior legislative gerrymander or, as here, judicial perpetuation of a prior Democratic gerrymander. App. Br. at 27-28. These corrective legislative plans would be condemned even though they are indistinguishable in both purpose and effect from any *judicial* remedy to a meritorious gerrymandering claim under *Bandemer*, the "sole purpose" of which is to "lessen the power" of the gerrymandering party by "altering the future partisan outcome of elections." App. Br. at 17, 27. Appellants' test would also condemn the "common practice" of "choos[ing] a redistricting plan that gives [a party] an advantage at the polls," without "distort[ing]" districts through irregular "configurations" or failure to adhere to other neutral "criteria" such as "the observance of political subdivision lines," simply because the party's representation exceeded that of the prior plan. *Bandemer*, 478 U.S. at 165 (Powell, J., concurring); *see Vieth*, 541 U.S. at 321-23 (Stevens, J., dissenting). Indeed, Appellants' proposal would condemn all mid-decade plans even when they *better* adhere to traditional districting criteria than the existing plan, if the

motive for adopting the substitute plan was "solely [to] alter[] the future partisan outcome of elections." App. Br. at 27. At the same time, it concededly would not touch *any* gerrymanders enacted before the first election, such as that in *Vieth*, because such plans purportedly "cannot serve *solely* partisan purposes" since they correct population inequality. *Id.* at 26 (emphasis in original).[3]

Thus, the inherent, insoluble problem with Appellants' proposal is that it asks whether a legislature had an impermissible purpose in isolation and defines "impermissible" as seeking to improve the majority party's position relative to the *status quo*, without regard to whether the plan had a dilutive or impermissible effect on voting power at even the district level. Appellants make the almost comical assertion that this is somehow a *virtue*, because it eliminates the need to articulate a comprehensible standard concerning "how much bias is too much." *Id.* at 17. Thus, the "solution" to the intractable problem of defining whether and when politically motivated redistricting imposes a constitutional injury is simply to strike down such plans *regardless* of whether there is any such constitutional injury. As we presently show, however, it is well established that

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[3] Nor can Appellants' test be coherently altered to permit mid-decade redistricting where the legislative plan replaces a "politically unfair" plan. While this would eliminate the facially absurd results described above, it would require this Court to establish standards both for what constitutes a plan that is sufficiently "unfair" to be "replaceable" and for the "political fairness" limits governing the replacement plan. By definition, articulating a judicially manageable standard for assessing the fairness of both the pre-existing and the substitute legislative plan would be twice as difficult as the heretofore elusive effort to establish manageable standards for assessing whether a single legislative plan violates constitutional norms of "fairness." *See Vieth*, 541 U.S. at 281-84 (plurality op.); *cf. Gaffney*, 412 U.S. at 750-51 (even though judicially manageable standards exist for examining one plan's compliance with *population equality* requirements, courts "should never begin" assessing a plan's compliance by comparing it to competing plan).

allegations of purpose alone are insufficient to state a viable gerrymandering claim and it is equally clear that the only even potentially impermissible effect is statewide dilution of the disfavored party's overall voting strength.

B. Impermissible Statewide Effect Is A Necessary Element Of Any Conceivable Constitutional Challenge To Politically Motivated Redistricting

All Justices recognize the seemingly self-evident proposition that a redistricting plan cannot even potentially offend the rights to vote or political association unless it actually *burdens* those rights—*i.e.*, has an impermissible *effect*—and thus every Justice has rejected the notion that a constitutional violation can be premised on purpose alone. They recognize that it is quite impossible to analyze whether a legislature intended to achieve an unconstitutional result without defining what that result is, that "political" purposes are inevitably and permissibly part of legislative redistricting and, most obviously and importantly, that there can be neither a violation nor a remedy if there is no unconstitutional effect. If the Court cannot say that a plan has the effect of visiting a constitutionally impermissible burden on "fair and effective representation," it cannot say that the legislature imposed such a burden or determine how a remedy can properly alleviate such a burden.

1. *Every* Justice in *Bandemer* rejected the notion that a constitutional violation can be found based on partisan purpose alone.[4] In *Vieth*, moreover, at least five Justices

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[4] The plurality stated that "plaintiffs were required to prove both intentional discrimination against an identifiable political group *and an actual discriminatory effect on that group*," which could occur only "when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." 478 U.S. at 127, 132 (emphasis added). Justice Powell, joined by Justice Stevens, suggested "that the ultimate inquiry ought to focus on whether district boundaries had been drawn solely for partisan

held that partisan purpose alone—even "sole purpose"—does not state a cognizable constitutional claim. The Court's core holding necessarily was that "the *facts alleged by the plaintiffs* [were] . . . inadequate to state a claim." 541 U.S. at 301 (plurality op.) (emphasis added). And "the complaint alleged that the districts created by the [challenged plan] were 'meandering and irregular,' and 'ignor[ed] all traditional redistricting criteria . . . *solely for the sake of partisan advantage*.'" *Id.* at 272-73 (emphasis added); *see also id.* at 313 (Kennedy, J., concurring) ("Appellants' complaint alleges no impermissible use of political classifications and so states no valid claim upon which relief may be granted."). The plurality also expressly rejected the "sole purpose" tests suggested by Justice Stevens' *Vieth* dissent and Justice Powell's *Bandemer* concurrence. *Id.* at 290-95.[5] And Justice Kennedy agreed that the *Vieth* appellants' test and Justice Stevens' and Justice Powell's standards are "either unmanageable or inconsistent with

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ends," *Vieth*, 541 U.S. at 290-91 (plurality op.) (describing Justice Powell's *Bandemer* opinion), but expressly agreed with the plurality "that a partisan political gerrymander violates the Equal Protection Clause *only* on proof of *both* intentional discrimination against an identifiable political group *and an actual discriminatory effect on that group*." 478 U.S. at 161 (emphasis added). Justice O'Connor's concurrence concluded that allegations of political purpose and effect failed to state a viable or manageable claim. *Id.* at 144-45.

[5] Justice Stevens extensively cited the appellants' "sole purpose" allegations and proposed his own "sole purpose" test. 541 U.S. at 321, 326, 338, 334. Yet the plurality concluded that Justice Stevens' "sole purpose" test is not a justiciable standard in the context of political gerrymandering and, in all events, does not identify any constitutionally cognizable harm. *Id.* at 292-95. The plurality similarly rejected Justice Powell's test in *Bandemer*, under which "the ultimate inquiry . . . focus[es] on whether district boundaries had been drawn *solely for* partisan ends to the exclusion of all other neutral factors relevant to the fairness of redistricting." *Id.* at 290-91 (emphasis added).

precedent, or both." *Id.* at 308.[6] Moreover, the Court's rejection of the *Vieth* appellants' "predominant purpose" test as inherently "vague" and unworkable applies *a fortiori* to the "sole purpose" variation offered here, because "we are sure appellants do not think" that their test is satisfied if there is a *single* apolitical district line in the challenged plan. *Id.* at 285 (plurality op.); *see id.* at 308 (Kennedy, J., concurring).

Moreover, Justice Kennedy's concurrence in *Vieth*, in discussing potentially cognizable claims, agreed that constitutional "concerns arise where an apportionment has the purpose *and effect* of burdening a group of voters' representational rights." *Id.* at 314 (emphasis added); *accord id.* at 315. Thus, the availability of a constitutional claim "[o]f course . . . depends first on courts having available a manageable standard by which to measure the *effect* of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Id.* (emphasis added); *accord id.* at 308. The absence of an allegation of impermissible effect mandated dismissal: "[A]ppellants' evidence at best demonstrates only that the legislature adopted political classifications," and this political purpose alone "describes no constitutional flaw." *Id.* at 313; *accord id.* at 315 ("The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights."); *id.* at 307 (same).

Appellants nonetheless suggest that Justice Kennedy's statement that a gerrymander may violate the law if

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[6] Justice Breyer also made clear that "[t]he use of purely political considerations in drawing district boundaries" is not an "evil" absent constitutionally cognizable "harm"—the unjustified entrenchment of the minority party in power. 541 U.S. at 355; *see also id.* at 366. Justice Souter, joined by Justice Ginsburg, similarly stated that "[t]he harm from partisan gerrymandering is . . . a species of vote dilution." *Id.* at 354.

classifications are applied "in a way unrelated to any legitimate legislative objective" somehow supports their test. 541 U.S. at 307. But Justice Kennedy made clear in the very next sentence, and elsewhere, that a classification is unrelated to legitimate aims of apportionment only when it denies "fair and effective representation for all citizens." *Id.*; *see id.* at 312. And Justice Kennedy's basic thesis was that a political gerrymandering claim cannot prevail when "there are yet no agreed upon substantive principles of fairness in districting" and, thus, no "standards for measuring the particular burden a given partisan classification imposes on representational rights." *Id.* at 308. That is why a court can act only in the purely hypothetical scenario where it can determine that fair and effective representation is denied without making any determination as to what fair and effective representation might be. *See id.* at 312 (law declaring that "'all future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles . . . .'"). Unquestionably, a demonstration only of political purpose cannot make the requisite showing that there is a "burden" on representational rights or the "fair and effective representation" that was central to Justice Kennedy's analysis. In any event, as Appellants elsewhere concede, it is clear that Justice Kennedy, in the relevant passage, was discussing "maps driven purely by politics," and thus inherently said nothing to support Appellants' condemnation of a legislative effort to engage in a redistricting effort solely because of politics. App. Br. at 26.

2. These various opinions reflect the obvious point that politically based redistricting cannot possibly impair any constitutional interest in voting or representation unless, at a bare minimum, the overall result of the plan is an "extreme form of disproportionate representation." *Id.* at 352 n.7 (Souter, J., dissenting). Political gerrymandering cannot burden the weight or availability of an individual's vote because (1) each member of the allegedly victimized party

remains equally able to register and cast their ballots on election day; and (2) where districts are equal in population, each vote has the same weight whether it is cast by a Republican, a Democrat, or a voter from some other party. *See Bandemer*, 478 U.S. at 150 (O'Connor, J., concurring). Assigning voters to separate yet equally populated districts based on political affiliation, like a requirement that Republicans register on red paper and Democrats register on blue paper, is a political classification, but imposes no cognizable burden on the individual right to vote, and so is not potentially unconstitutional unless some electoral or representational harm results from the separation.

Rather, the *only* difference between the vote of a member of the disfavored party and a member of the favored party is the probability that it will be part of an "effective aggregation . . . of like-minded voters to claim a just share of electoral results"—*i.e.*, the "group right" to elect one's preferred candidates. *Bush v. Vera*, 517 U.S. 952, 1049 (1996) (Souter, J., dissenting). This group-based interest in electing candidates is not infringed simply because a *particular district* is configured in a way that prevents one party's candidate from being elected, since there is no "right" to elect one's preferred candidate in any particular district. *See Vieth*, 541 U.S. at 288 (plurality op.); *Bandemer*, 478 U.S. at 131-33, 140-41 (plurality op.); *cf. United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 166 (1977); *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971).[7] If a group can elect candidates in numbers

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[7] Since there cannot be any cognizable injury to a group's voting strength at the district level, the only conceivable injury is a "different type of 'representational' harm." *Vieth*, 541 U.S. at 328 (Stevens, J., dissenting). A majority in *Vieth*, however, squarely rejected this vaguely defined "representational" harm to a political group as not constitutionally cognizable and, in all events, Appellants do not allege it here. *Id.* at 288-90 (plurality op.); *id.* at 313 (Kennedy, J., concurring).

proportionate to the percentage of that party's voters in the State, there is no conceivable constitutional claim.

In *Gaffney*, for example, a consistent pattern of intentionally designing a series of individual districts to ensure the election of one party's candidate in those districts did not raise a cognizable equal protection concern because the overall result of the partisan-designed districts was to produce a "rough sort of proportional representation." 412 U.S. at 754; *see id.* at 752; *see also Vieth*, 541 U.S. at 351 n.6 (Souter, J., dissenting) (*Gaffney*'s "approval of a bipartisan gerrymander" is "settled law"). Even more obviously, no one could argue that a *Republican* voter in Pennsylvania, whose group benefited statewide from the "packing" of Democrats, suffered cognizable harm because he had intentionally been shunted, on the basis of his political affiliation, into a "packed" Democratic district where he had no hope of electing his preferred candidate. Rather, as the counsel for the Democrats in *Vieth* and for the Jackson Appellants here aptly stated, the "only way to assess packing and cracking is on a statewide level" because "[t]he fact that a given district may favor a given party is of no significance by itself, absent statewide effects." Brief of Appellants at 39, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-580); *see Bandemer*, 478 U.S. at 127, 136 (plurality op.) ("[T]he only way to assess [gerrymandering] is on a statewide basis."); *cf. Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (unlike partisan gerrymandering, racial gerrymandering can be confined to one district).[8] Plans that

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[8] This is also the consensus view of redistricting commentators. *See, e.g.*, Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 73 (2004); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. Pa. L. Rev. 503, 510 (2004); Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 92 (1985); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 Harv. L. Rev. 2598, 2613 (2004).

provide "fair and effective representation," just like "politically unfair" plans, place voters in districts where there is no reasonable opportunity to elect their preferred candidate—the only difference is *how many* such districts there are for each party statewide.

3. For similar reasons, Appellants' effort to rely on First Amendment and related cases condemning discriminatory exclusion based on a "bare . . . desire to harm a politically unpopular group" because of political affiliation is unavailing. App. Br. at 20 (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973)). First, unlike in civil service employment and similar situations, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753; *accord id.* at 752, 753; *Vieth*, 541 U.S. at 285 (plurality op.); *id.* at 358 (Breyer, J., dissenting); *Miller*, 515 U.S. at 914. Therefore, even Appellants concede that while it is improper to use political affiliation as a significant or dispositive factor in the civil service context, *see, e.g., Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), such political considerations are permissible in redistricting, so long as they are not the "sole purpose." App. Br. at 17. Equally important, denial of a job or government benefit or contract because of political affiliation visits a tangible harm on the individual, which does not occur when voters are separated into fungible districts on that basis. *Cf. O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1993); *Elrod v. Burns*, 427 U.S. 347 (1976). Consequently, to establish any injury even remotely comparable to the political patronage cases, redistricting plaintiffs must establish that the plan created a "harm" to the "group" by unfairly diluting their party's voting strength statewide. *Moreno*, 413 U.S. 528. That is why, as Justice Kennedy noted, any potential First Amendment claim "[o]f course . . . depends first on courts' having available a manageable standard by which to measure the *effect* of the apportionment and so to conclude that the

State did impose a burden or restriction on the rights of a party's voters." *Vieth*, 541 U.S. at 315 (emphasis added).

In short, under either the First or Fourteenth Amendment, the requirement that plaintiffs show a discriminatory statewide effect is simply a requirement that they establish some cognizable harm. And, of course, one cannot establish impermissible dilutive effect unless one specifies the benchmark for undiluted voting strength. *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997) ("[T]he very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured . . . ."). Here, Appellants do not and cannot allege any district-specific harm, and they suggest that Republicans have "too many" seats statewide only in the sense that Republicans have more seats than under the court-drawn plan. But a Democrat's vote in Texas can be potentially "minimized" or "diminished" only if the cumulative effect of those votes secures proportionately fewer seats than the cumulative Republican votes, so the only possible benchmark for statewide dilution is whether the percentage of seats equals the percentage of votes. In light of Appellants' failure to allege that the Republican share is severely disproportionate or otherwise violative of some well-accepted standard of minimum partisan fairness, they have simply failed to contend that there is any statewide dilution of Democratic voting power and, consequently, any cognizable impairment of the right to vote or associate.

C. Political Gerrymandering Does Not Offend Any Constitutionally Cognizable Value And Such Claims Are Nonjusticiable

Allegations of a political gerrymander can never state a viable constitutional claim because (1) a gerrymander's only effect on the right to vote or associate is on the group's ability to secure representation commensurate to the group's proportion of the electorate; (2) there is no constitutional right to proportional representation or roughly proportional

representation; and (3) there is no principled or manageable basis for establishing when disproportionate representation "goes too far." This is especially obvious where, as here, the claims focus on *one* State's representatives to a *national* legislature. Although the Court need not reach the issue because Appellants allege no statewide dilution or disproportionality, it should nevertheless make clear that allegations of political gerrymandering do not state an acceptable claim because they allege no constitutional injury and certainly not one capable of consistent, manageable judicial definition.

At least 7 of 9 Justices in *Bandemer* and 8 of 9 Justices in *Vieth* explicitly rejected the notion that the Constitution requires proportional representation.[9] Indeed, the residents of small States have grossly disproportionate representation in the Senate and, to a lesser extent, in the Electoral College as well. Moreover, at-large elections, which allow a party with a bare majority of votes to win all elections, are used for all Senate elections, were frequently used for congressional elections in earlier times, and would be *required* for congressional elections where neither the state legislature nor courts redistricted in time for an election. *See Branch*, 538

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[9] *Bandemer*, 478 U.S. at 130 (plurality op.) ("Our cases ... clearly foreclose any claim that the Constitution requires proportional representation ...."); *id.* at 155 (O'Connor, J., concurring) (political gerrymandering claims nonjusticiable because such claims ultimately "evolve towards some loose form of proportionality"); *Vieth*, 541 U.S. at 288 (plurality op.) ("[T]he Constitution nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers."); *id.* at 352 n.7 ("I agree with this Court's earlier statements that the Constitution guarantees no right to proportional representation.") (Souter, J., dissenting); *id.* at 357-58 (Breyer, J., dissenting). Five Justices also rejected the *Vieth* appellants' similar claim that the majority is entitled to a majority of representatives. *Id.* at 288-89 (plurality op.); *id.* at 308 (Kennedy, J., concurring).

U.S. at 275. A proportionality mandate, therefore, would invalidate the elections for at least two, and potentially all three, political institutions of the federal government.[10]

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[10] The proposed "symmetry standard" of *Amici* Gary King *et al.* also rests upon the same discredited notion of "equal representation in government [for] equivalently sized groups" that five Justices in *Vieth* rejected as a constitutional standard. 541 U.S. at 288 (plurality op.); *id.* at 308 (Kennedy, J., concurring); *see* King Br. at 9. This standard asks whether the parties achieve the same proportion of seats to votes at equivalent voting levels. Thus, a plan under which a party receives 55% of votes and wins 55% of seats is "biased" and impermissible if the other party would win 45% (or 65%) of seats with 55% of votes. While assessment of this "partisan bias" may be an interesting academic exercise, it has no utility for assessment of a plan's fairness in real-world adjudication. By definition, it does not assess the electoral results that will actually be produced by a plan, but makes its validity turn on theoretical results that might occur if political circumstances significantly change. But if Democrats in Texas and Republicans in New York actually receive a proportionate share of seats under a plan, it should not matter whether the same share of seats would result if the situation was reversed and the minority parties began receiving 60% of the vote. This is particularly true if, as here, there is no allegation or empirical basis for suggesting that this dramatic reversal will occur. As the *Vieth* appellants themselves put it, a claim should not be assessed by whether "the rival party would get a majority of seats if it increased its vote share to a level that history shows to be improbable." *Vieth* App. Br. at 35 n.30. Moreover, even if it were relevant, the judiciary is simply not able to accurately assess not only the decade-long results that a plan will produce if then-current political circumstances persist, but *also* how many seats will result for the other party if circumstances change in a myriad of ways. *Cf. Vieth*, 541 U.S. at 289 (plurality op.) (noting how, when circumstances change, "the candidates change, their strengths and weaknesses change, their campaigns change, their ability to raise money changes, the issues change—everything changes"). This is particularly true since *amici* admit that there is no professionally accepted standard as to how any of a wide variety of extremely amorphous "inputs" should be used to estimate these widely divergent results. King Br. at 9-10. And even if "asymmetry" or "bias" were the standard for assessing a plan's fairness, courts would still have to answer "the original unanswerable question" of "[h]ow much [asymmetry or bias] is too much" and *amici*

Moreover, the concept of statewide proportionality has no relevance in assessing seats for a *federal* legislature for all 50 States. Even if a party's lack of proportional representation in a state legislature were a cognizable deprivation of "majority rule," lack of proportional representation on a State's congressional delegation, which decides nothing, is meaningless.[11] Examining congressional representation only with respect to certain States would be as myopic as analyzing a state legislature's redistricting only with respect

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acknowledge that there is no professionally accepted standard on this question. *Vieth*, 541 U.S. at 296 (plurality op.); King Br. at 9.

[11] Nor is there anything to the shibboleth that partisan gerrymanders offend the Constitution because they reduce the number of "competitive" districts and therefore reduce the "responsiveness" of legislators to their constituents. First, this Court has upheld the creation of safe districts for both Republicans and Democrats, *see Gaffney*, 412 U.S. 735, and, relatedly, districts that protect the parties' incumbents. *See Vera*, 517 U.S. at 967-68; *Miller*, 515 U.S. at 916; *Shaw*, 509 U.S. at 646; *Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring). Moreover, even if a less competitive district causes a representative to focus more on the shared policy interests of his own party, rather than respond more to the opposition, there is simply nothing in the text or history of the Constitution that prohibits this result. *See Vieth*, 541 U.S. at 288 n.9 (plurality op.) (no constitutional distinction between "10 wishy-washy Democrats" and "5 hardcore Democrats"). Third, there is no basis to assume that an elected official who faces "competitive" elections—such as Senator Jesse Helms of North Carolina, former President Reagan, or current President Bush—will be more responsive to the views of the minority party than to his political base, which may be energized by "wedge issues" that *alienate* the opposing party. Finally, unlike a "*bipartisan* gerrymander" such as the one sanctioned in *Gaffney*, which makes all districts safe for one party and especially for incumbents, a *partisan* gerrymander usually displaces incumbents and contains a greater number of competitive districts that "lean" for the favored party, rather than a smaller number of districts that are "safe" for that party and potentially waste its votes. And the "safest" districts are those that "pack" the *disadvantaged* party's voters, so it is the *advantaged* party's voters that suffer from any resulting lack of responsiveness.

to certain *counties*' delegations. The current situation, in fact, confirms that a party's ability to win a few seats in excess of strict proportionality in one State typically will be offset by the other party's excess in another State: Republicans currently hold approximately 53% of the seats in the House of Representatives, receive about 51% of the nationwide congressional vote, and hold 55% of the seats in the Senate, a body whose composition is entirely immune from the effects of line-drawing. *See infra* n.13. Thus, accepting a gerrymandering challenge to congressional districts in one State necessarily would require the federal judiciary to analyze such districts in all States, and this Court to review all of the lower court decisions to ensure an overall "fair" result. *See Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring) (if individual voter can bring statewide challenge to state legislative redistricting, "members of a political party in one State should be able to challenge a congressional districting plan adopted in any other State, on the grounds that their party is unfairly represented in that State's congressional delegation, thus injuring them as members of the national party"). Finally, for problems in congressional redistricting, "the Framers provided a remedy . . . in the Constitution." *Vieth*, 541 U.S. at 275 (plurality op.).[12]

In any event, as we presently show, the quite "fair" plan challenged here cannot possibly constitute a proscribed "gerrymander" under any standard.

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[12] The Elections Clause, Article I, § 4, cl. 1, which permits "Congress to 'make or alter' [congressional] districts if it wished," was designed to allow Congress to remedy partisan gerrymandering, and Congress repeatedly has considered using its authority to that end. *Vieth*, 541 U.S. at 275-76 (plurality op.). Thus, the Framers anticipated the issue, debated how to address it, and specifically gave Congress, not the judiciary, authority in this area.

D. The Texas Legislature Enacted A Politically Fair Plan To Replace A Politically Unfair Plan

The Legislature's plan is "fair" to Democrats under any accepted standard and the plan it replaced was palpably "unfair" to Republicans. In the 2004 Texas elections, Republican candidates for Congress received approximately 60% of the two-party vote (58% of the total vote), reflective of their statewide voting support over at least the last decade.[13] Even a concededly fair and completely neutral plan typically will result in a "bonus" for the majority in the form of a larger percentage of seats than its percentage of statewide votes. *See Bandemer*, 478 U.S. at 130 (plurality op.); *id.* at 159 (O'Connor, J., concurring); *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting).[14] Thus, the challenged

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[13] All congressional data cited herein are available at <http://clerk.house.gov/members/electionInfo/elections.html>. A party's voting strength is best "measured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; *i.e.*, in congressional elections if a congressional map is being challenged." *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting); *see Bandemer*, 478 U.S. at 134 (plurality op.); *see generally* Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Poli. Sci. Rev. 540 (1973). Because most voters are "ticket-splitters," statewide contests for *different* offices do not shed light on statewide voting strength in congressional elections. *See Vieth*, 541 U.S. at 288 (plurality op.). In any event, Republican candidates in Texas received essentially the same percentage of votes in the 2004 congressional elections as they did in statewide elections in 2004 and recent years (not including Presidential elections, in which the Republican vote share was even higher). All data for statewide contests cited herein are available at <http://elections.sos.state.tx.us/elchist.exe> and summarized by the district court at J.S. 41-43a. In all elections, each major party's percentage of the total vote generally is slightly lower than its percentage of the two-party vote, which is the more standard measure for comparing votes received to seats won. *See* Tufte, *supra*, at 540 n.1; Br. of *Amici Curiae* Alan Heslop *et al.*, § I.A.

[14] *See also* King Br. at 8; Heslop Br. § I.A; *Vieth* App. Br. at 34; Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev.

enactment achieved indisputable partisan fairness when Republicans won 66% of the seats with 60% of the two-party congressional vote statewide. Indeed, given the "winner's bonus," a party with 60% of the vote would more naturally be expected to win *70%* to *80%* of the seats in a neutral, fair plan.[15] *See, e.g.*, King Br. at 8 n.4 ("two to three percent increase in seats" for every "one percent increase in votes [above 50%]"); Heslop Br. § I.A; Tufte, *supra*, 67 Am. Poli. Sci. Rev. at 546 ("change of 2.5 per cent in seats" for each "1.0 per cent change in votes [above 50%]").

The partisan fairness of the challenged plan is confirmed by comparison to bipartisan redistricting plans specifically approved by the Court and those enacted in other States. In the 1972 election under the plan approved in *Gaffney*, Republican candidates received 53% of votes, and thus would have been expected to win 56% to 59% of seats, and actually won 62% of seats. Reply Br. for Appellant at 18-21, App. 3a, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (No. 71-1476). In the 2004 congressional elections under California's 2002 bipartisan plan, Democratic candidates received 55% of the two-party vote (53% of the total vote), and thus would have been expected to win 60% to 65% of seats, and actually won 62% of seats. And in 2002 in New York, a divided state government enacted a bipartisan congressional plan under which Democrats received 60% of the two-party vote (59% of the total vote), roughly the same as the Republicans in Texas, and won 69% of seats, or 3% more than the Republicans in Texas, in the 2004

751, 765 (2004); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 Election L.J. 179, 198 (2003).

[15] The 10% Republican margin above 50% of votes would be expected to produce a margin of seats 2 to 3 times greater (20% to 30%) above 50%, or 70% to 80%. These percentages translate to 22.4 (70% of 32) or 25.6 (80% of 32) Republican seats, compared to the 21 actually garnered.

congressional elections. The Texas redistricting legislation of 2003, therefore, achieved the fairness of a bipartisan plan.

Indeed, the Texas plan is comparable to or *more* fair than the overwhelming majority of redistricting plans nationwide. For example, in Massachusetts, where Democratic support is roughly similar to Republican support in Texas, Democrats control *all* of the congressional districts, even though the Democrats garnered only 70% of the total statewide vote. More generally, in the 2004 elections, the party receiving more than 50% of the two-party vote won a higher percentage of seats (*i.e.*, a "winner's bonus") in 31 of the 40 States which have more than one Representative and tabulate election results for all districts. The Texas plan's minor departure from strict proportionality (6% more seats than votes) *and* its minor "winner's bonus" (1.6% of seats for every 1% of votes over 50%) were *roughly the same or smaller than those produced by the plans in more than 80% of these States. See* Heslop Br., Chart TX-22 (summarizing official election results). Furthermore, it is not and cannot be contended that any other standard, including the "symmetry standard" proposed by *amici* (*see supra* n.10), suggests that the challenged plan is unfair to Democrats.

Redistricting was necessary to achieve this partisan fairness because the 2002 plan "perpetuated much of" the "prior partisan gerrymander" that had been enacted by the Democrats in 1991. J.S. 12-13a.[16] The Democrats'

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[16] Notwithstanding Appellants' absurd claim that the district court erred in describing *its own* map-drawing methodology, there can be no dispute that even though the court did not *intend* this result, "[t]he *practical effect* of [its] effort was to leave the 1991 Democratic Party gerrymander largely in place as a 'legal' plan." J.S. 22a (emphasis added); *see* Michael Barone, *The Almanac of American Politics 2004*, at 1508 (2003) ("Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001.").

gerrymander had been "the shrewdest of the 1990s," *id.* at 20a (quoting Michael Barone, *The Almanac of American Politics 2002*, at 1448 (2001)), as evidenced by the fact that the Democrats in 1992 received 51% of the two-party congressional vote (50% of the total vote)[17] but nevertheless won *70%* of the seats. By 2000, the Democrats' share of the congressional vote had dropped to 49% of the two-party vote (47% of the total vote),[18] which ordinarily would translate into 47% to 48% of seats, but they nevertheless retained 57% of the seats. Similarly, under the court-drawn plan in 2002, the Democrats won 53% of the seats even though they received 45% of the two-party congressional vote (44% of the total vote),[19] which ordinarily would translate into 35% to 40% of seats. Thus, in both 2000 and 2002 a Republican *majority* won a *minority* of seats. This frustration of "majority rule," which otherwise occurred only a handful of times across the United States in the two election years combined,[20] was condemned in *Vieth* by the Democratic appellants and Justice Breyer as a clear sign of an unconstitutional gerrymander. *See* 541 U.S. at 287 (plurality op.); *id.* at 366 (Breyer, J., dissenting).

Indeed, the deprivation of the Republican majority's "fair share" in Texas was the "worst" in the Nation because both

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[17] Democrats received about 50% of the two-party vote (49% of the total vote) in statewide elections.

[18] In 2000 statewide elections, the Democrats received a much smaller vote share: 39% of the two-party vote (38% of the total vote) in the Presidential election and about 40% of the two-party vote (and 40% of the total vote) in other statewide contests.

[19] Again, the Democrats received a smaller share—about 42% of the two-party vote (41% of the total vote)—in statewide elections.

[20] In several cases the "majority" party received only about 51% of the two-party vote, and in all cases the majority party would have won the majority of districts if only one seat had gone the other way. *See* Heslop Br., Charts TX-51-52 (summarizing official election results).

the 2000 and 2002 plans resulted in the Republicans winning far fewer seats than expected with the winner's bonus—9% to 10% (roughly 3 seats) fewer in 2000, and 13% to 18% (roughly 4 to 6 seats) fewer in 2002. As noted, the 2003 enactment merely reduced but did not eliminate the unfairness for Republican voters in congressional elections, and, wholly apart from the winner's bonus, the divergence from strict proportionality in Texas congressional districts was greater in 2000 and 2002 (8%) than 2004 (6%).

Appellants' only feeble response is that the 2001 court-drawn plan would not be "unfair" if, hypothetically, Texas' citizens voted in congressional elections in the same way they do for *statewide* offices. App. Br. 27-28. But it is plainly erroneous "to think that majority status in statewide races establishes majority status for district contests" since it "assuredly is not true" that "the only factor determining voting behavior at all levels is political affiliation." *Vieth*, 541 U.S. at 288 (plurality op.). For example, the results of gubernatorial contests in Massachusetts, which Republicans have won for the past 15 years, would shed no light on the fairness of congressional districts under which all 10 Representatives for Massachusetts are Democrats. At a minimum, it was surely reasonable for the Texas Legislature to "measure" fairness by the traditional method of looking at the "*relevant* set of elections, *i.e.*, congressional elections if a congressional map is being challenged." *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting) (emphasis added). Since voters in Texas are concededly "ticket-splitters" who vote differently for Congress than for other offices because of incumbency effects or other factors (App. Br. at 29), it is quite beside the point that the court-drawn plan would have been marginally "fairer" to Republicans if congressional voting mimicked other voting.[21] And if statewide votes *were*

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[21] For the same reason, the State's expert's analysis of the results produced by the various plans if one disaggregated various *statewide*

the proper measure, there is only a one- or two-seat difference between the legislative and court-drawn plans—hardly a difference of constitutional magnitude.[22]

In addition, the challenged plan is more politically fair, and the prior Texas plan much less politically fair, than the Pennsylvania plan upheld in *Vieth*. Under the *Vieth* plan in 2004, Republicans won 63% of the seats with only 51% of the two-party congressional vote,[23] which ordinarily would yield only 52% to 53% of seats. Thus, the Republican plan in Pennsylvania yielded 2 more seats for Republicans than the norm for their vote share. This outcome was far more favorable for their own party than what the Republican plan in Texas yielded for Republicans (1.4 to 4.6 *fewer* seats than the norm). In contrast, the 2000 and 2002 plans favored Texas Democrats (by yielding roughly 3 to 6 seats more than the norm) to a *greater* degree than the challenged *Vieth* plan favored Republicans. Thus, "the 2003 Texas legislative plan . . . dismantl[ed] a prior partisan gerrymander that had entrenched a minority party . . . ," J.S. 25a, and achieved remarkably fair partisan balance.

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elections into congressional districts says nothing about the plans' *actual* results and fairness. Moreover, even under this artificial analysis, the court-drawn plan produced *less* than the normal share of seats for the majority party. In 2000 statewide elections, Republican candidates received an average of 60% of two-party votes, which would translate to 70% to 80% of seats, and those candidates' average votes "carried" 66% of the court-drawn districts. In 2002 statewide elections, Republican candidates received an average of 58% of two-party votes, which would translate to 66% to 74% of seats, and those candidates' average votes "carried" 62.5% of the court-drawn districts. J.A. 207-10; J.S. 42a.

[22] Based on results in the statewide races, Democrats would have "won" 11 seats in 2000 and 12 in 2002 under the court's plan, while receiving 10 seats under the legislative plan in both years. J.A. 207-10.

[23] The outcomes of statewide elections in Pennsylvania likewise have been, on average, roughly 50-50. *See Vieth* App. Br. at 43.

II. SECTION 2 DID NOT MANDATE RETENTION OF THE 21% BLACK DISTRICT AT ISSUE HERE

A. Former District 24 Was Not A Black "Opportunity District"

Appellants contend that Section 2 does not "exclude from statutory protection districts that operate as minority opportunity districts even though the relevant group lacks an absolute majority of the population." App. Br. at 16. This legal question, however, is not presented here because the district court squarely found that District 24 is not a "Black opportunity district," but "a strong Democratic district" which "Anglo Democrats control," and Appellants do not challenge that finding as clearly erroneous. J.S. 111-12a. Nor could they since black voters in this district clearly could not elect a preferred *black* candidate for Congress.

The potential for a black candidate's success is necessary because, without it, blacks do not have an equal opportunity to elect their preferred candidate. Rather, "candidates favored by blacks can win, but only if the candidates are white." *Jeffers v. Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991). If the ability to elect black-preferred white Democrats constituted equal opportunity, then black voters in the South had an equal opportunity in the 1960s and 1970s because white Democrats overwhelmingly supported by blacks were routinely able to win in districts, like the district here, where blacks comprised only 21.4% of the voting age population. *Cf.* Chandler Davidson, *The Voting Rights Act: A Brief History, in Controversies in Minority Voting: The Voting Rights Act in Perspective* 7, 24 (Bernard Grofman & Chandler Davidson eds., 1992).

Here, as the district court correctly noted, there is no evidence that blacks have an opportunity to elect a candidate of their own race, if they so choose. No black candidate has ever even tried to run in this district or any of its predecessor districts. As Representative Johnson, a black Democrat in

the adjacent congressional district, testified, the district was drawn by white Democrat Representative Frost to ensure his own reelection. J.S. 111a; *see also Vera v. Richards*, 861 F. Supp. 1304, 1319-22 (S.D. Tex. 1994); J.A. 264-66. Moreover, in statewide races, the only black candidate to receive a majority of votes in this district was Ron Kirk, and this result was anomalous because he was the "former popular Mayor of Dallas" who received an astonishing 99% of the black vote in the primary. J.S. 112a; J.A. 92-94. The other two black candidates analyzed both lost decisively in the Democratic primary, although black voters gave overwhelming (roughly 72%) support to Judge Morris Overstreet. J.A. 75-76; *see also* J.S. 112a. This belies Appellants' suggestion that constituting a majority in a primary somehow suggests black control of even that primary election. And, as the district court correctly noted, these *statewide* races say virtually nothing about what would happen in a real, contested Democratic primary conducted in District 24, where Anglo turnout would dramatically increase, particularly if the white candidate was well-financed Representative Frost, who had insured that the district includes "many communities that had been loyal to him in the past." J.S. 106-07a; *Bush v. Vera*, 517 U.S. at 1015 (Stevens, J., dissenting).

Thus, there is no basis for concluding that Appellants proved that the small black population here could "usually" defeat the combined voting of the two larger Anglo and Hispanic groups in the district, *Gingles*, 478 U.S. at 49, or for overturning the district court's well-supported finding. In any event, as we discuss at length, Appellants are quite wrong in suggesting that Section 2 requires the creation of districts where minorities constitute a minority simply because the minority-preferred candidate will usually win in

that district, but usually lose in the alternative district created by the legislature.[24]

B. Section 2 Does Not Authorize "Coalition/ Opportunity" Claims

Appellants' claim is premised on the principle that minority voters have a presumptive "right" to districts where their party's candidates will usually win whenever it is feasible to create or preserve such a district, at least up to the

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[24] Even if Appellants' "coalitional district" theory is accepted, their complaint is legally insufficient for another reason. As this Court has made clear, "the inability to elect representatives of their choice is not sufficient to establish a violation [of Section 2] unless, under the totality of circumstances, it can also be said that members of the protected class have less opportunity to participate in the political process." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The plain language of Section 2 requires a showing that members of the protected group have "less opportunity" than others "to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. § 1973(b) (emphasis added). *Chisom* squarely held that "[i]t would distort the plain meaning of [Section 2] to substitute the word 'or' for the word 'and'. Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect." 501 U.S. at 397. Here there is no evidence that minority voters lack a full opportunity to participate in the political process under the legislative plan. As the Court recently noted, "'the power to influence the political process is not limited to winning elections.'" *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (quoting *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring)). There is no suggestion here, for example, that members of the minority group "lack access to or influence upon representatives that it did not support as candidates." *Gingles*, 478 U.S. at 99 (O'Connor, J., concurring); *see also Ashcroft*, 539 U.S. at 482 ("[I]t is important to consider 'the likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account.'") (quoting *Gingles*, 478 U.S. at 100). Thus, even if Appellants were to prevail with respect to the opportunity to elect, they would be entitled to no relief because they have not shown that minority voters lack the opportunity to participate in the political process.

point of proportionality.[25] They purportedly have such a right in every district where minorities constitute a cognizable percentage of a successful bi-racial political coalition, even those such as old District 24, where blacks constituted just over one-fifth of the voting age population and were a smaller portion of the population than *both* Anglos and Latinos, where no black candidate had ever even run for office, and the district had been personally drawn by the long-standing white incumbent. Since blacks and Hispanics in virtually every State strongly support the Democratic party, this means that the federal judiciary must force state legislatures to create any reasonably compact district which provides the Democratic candidate with a likely opportunity to win. And, because Section 2 does not permit a dilutive "result" even if the district is drawn for entirely race-neutral reasons, this Democratic-leaning district is mandated regardless of whether the challenged district better complies with neutral districting criteria.

Appellants' syllogism, however, is plainly based on a false premise—*i.e.*, that minority voters must have the ability to elect their preferred candidate as part of a bi-racial political coalition to achieve the equal opportunity to "elect"

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[25] There is serious potential for semantic confusion concerning how districts are described or labeled. In *Ashcroft*, the Court seemed to suggest that a "coalition" district is one in which minorities are a minority, but they can nonetheless "elect a candidate of their choice" because white crossover voting "will help to achieve the electoral aspirations of the minority group." 539 U.S. at 481. The opinion indicated that there are also "influence districts" where the minority group is probably "not able to elect a candidate of choice," but where minorities can nevertheless "play a substantial, if not decisive, role in the electoral process." *Id.* at 482. But the type of district *Ashcroft* described as a "coalition" district is the same type of district that the Court said was an "influence" district in *Voinovich v. Quilter*, 507 U.S. 146 (1993). Specifically, "in such influence districts," minorities "could elect their candidate of choice . . . if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters." *Id.* at 154.

guaranteed by Section 2. Acceptance of this principle would convert the equal opportunity mandate of the Act into a requirement for preferential treatment of whatever party is supported by most minority voters. Further, if districts where minorities constitute a significant percentage of a winning bi-racial coalition really did provide them with the opportunities required by the Act, then the Legislature's 2003 plan, and virtually every plan, would not deny any such opportunity on a statewide basis because the number of such districts in the plan is equivalent to the percentage of blacks and Hispanics in Texas' electorate. In short, Appellants' assertion that Section 2 requires districts where a minority-preferred candidate can be elected by a bi-racial coalition is fundamentally at odds with any reasonable understanding of *minority* vote *dilution*, the language of the Voting Rights Act, and the reasoning of *Gingles*.

1. The plain language of Section 2 clearly establishes that there is no right, or presumptive right, of a minority-supported political coalition to usually elect its preferred candidate. It is obviously true that a minority-preferred candidate can be elected in a majority-white district through a bi-racial coalition, but the language of Section 2 clearly does not grant any *right* to have the federal judiciary create such districts so that the candidate preferred by that bi-racial coalition will usually win.

Under Section 2, plaintiffs must show that a redistricting plan results in minorities suffering a disadvantage, relative to non-minorities, "on account of race or color." 42 U.S.C. § 1973(a). Thus, "a violation of" Section 2 is established only if "the political processes leading to nomination or election ... are not *equally* open to participation by [minorities]." *Id.* § 1973(b) (emphasis added). Relatedly, the Act is violated only if members of a "protected" "class of citizens" "have *less* opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* (emphasis added). Depriving minorities of the ability to form a winning

coalition does not "result[]" in vote dilution "on account of *race*" and does not mean that minorities have "*less* opportunity than other members of the electorate . . . to elect representatives of their choice." *Id.* § 1973(a) & (b) (emphasis added).

Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial groups are. Minorities are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition, because *no* racial group (or group defined by any other characteristic) has a right to form a winning coalition.[26] To the contrary, they would be in precisely the same position as all groups constituting a minority of the population: their ability to elect their preferred candidate will be frustrated unless they are able to persuade the majority of the relative merits of their candidate. Granting minorities a right to rearrange districts so that their political coalition will usually win has nothing to do with equal opportunity, but is preferential treatment afforded to no others. "Section 2's proviso against finding a right to proportional representation merely confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a

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[26] *See UJO*, 430 U.S. at 166-67 (White, J.) (voters whose "candidate has lost out at the polls" have "no constitutional complaint" because "[t]heir position is similar to that of the Democratic and Republican minority that is submerged year after year by the adherents of the majority party who tend to vote a straight party line"); *Whitcomb*, 403 U.S. at 153 (no vote dilution claim when a minority group, "*along with all other Democrats*, suffers the disaster of losing too many elections") (emphasis added); *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting) (no Section 2 claim where minorities' "lack of success at the polls was the result of partisan politics, not racial vote dilution"); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members.").

guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994); *see id.* at 1020 ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground" to elect their preferred representatives).

Equally important, an electoral device is illegal only if it deprives a "class of citizens protected by subsection (a)"—*i.e.*, a racial or language minority group—of the ability "to elect representatives of their choice." 42 U.S.C. § 1973(b). If minorities cannot constitute a potential majority, then a redistricting plan has not denied *that* class the ability "*to elect* representatives of *their* choice." *Id.* (emphasis added). Since only a majority can elect,[27] and since the protected class cannot constitute a majority under any proper alternative, the enacted redistricting plan has not *denied* the protected class an ability to elect that they would otherwise possess. The only group "denied" the ability to elect (relative to the alternative redistricting plan), is the political coalition comprised of the protected class *plus* an additional group of nonminority citizens who happen to share the protected group's political preferences. Since Section 2 does not mandate preferential treatment of any political coalition, regardless of the extent to which that coalition is supported by minorities, and basic principles of judicial neutrality foreclose such preferences, it is clear that any harm to the bi-racial political coalition's potential electoral success is not an injury cognizable under Section 2. A bi-racial coalition that

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[27] Although a *plurality* can elect a candidate in a *three-way* race, this is of no significance under Section 2 because vote dilution necessarily deals with "structural" barriers that need to be assessed in terms of the "usual" situation, not "special circumstances" such as a three-candidate race, which will lead to "the success of a minority candidate in a particular election." *Gingles*, 478 U.S. at 51, 57; *see McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944 (7th Cir. 1988).

loses elections is "indistinguishable from political minorities as opposed to racial minorities." *See Nixon*, 76 F.3d at 1392.

2. This is precisely the point made in *Gingles*: unless minorities have the potential to constitute a majority, then demography, not the redistricting plan, has deprived them of the potential to elect, since majority status is necessary to elect representatives of choice. 478 U.S. at 50 n.17 ("[I]f . . . the minority group is so small in relation to the surrounding white population that it could not constitute a *majority* in a single-member district, these minority voters *cannot* maintain that they would have been able to elect representatives of their choice in the absence of [the challenged plan]."") (emphasis added); *see Growe v. Emison*, 507 U.S. 25, 40 (1993) ("The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.") (quoting *Gingles*, 478 U.S. at 50 n.17).

Contrary to Appellants' contention, the *Gingles* Court was not somehow unaware that minority groups comprising 30% or 45% of the polity often are able to form coalitions to elect their preferred representatives when it unequivocally stated that minorities constituting a numerical minority *cannot* elect their preferred representatives. All members of the Court have always recognized that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." *De Grandy*, 512 U.S. at 1020. *Gingles* itself directly ruled on such a district; one of the districts in that case had consistently elected a black candidate even though blacks constituted only 36.3% of the population. *Gingles*, 478 U.S. at 77; *see also id.* at 74 & n.35. And the *third Gingles* precondition directly recognizes this possibility, for a district without legally significant racial bloc voting is one where bloc voting by the white majority

does not "defeat the combined strength of minority support plus white 'crossover' votes." *Id.* at 56.

Consequently, contrary to Appellants' starkly revisionist history, *Gingles* consciously excluded coalition districts in expressly holding that the first "necessary precondition" to mounting a viable vote dilution claim is that the minority group be "sufficiently large and geographically compact to constitute a *majority* in a single member district." 478 U.S. at 50-51 (emphasis added). While *Gingles* (and subsequent opinions) reserved the question of what standards applied to "influence" claims (*id.* at 46 n.12; *Voinovich*, 507 U.S. at 158; *Growe*, 507 U.S. at 41-42 & n.5; *De Grandy*, 512 U.S. at 1008-09), nowhere does the opinion suggest that the word "majority" somehow connotes a district with a sufficient minority population to ensure that minority voters have the ability to "elect[] their preferred candidates." App. Br. at 9, 16, 32.

Other decisions of the Court similarly recognize that only in a majority-minority district can the minority group "elect a representative of its *own* choice" because only then can it "dictate outcomes independently." *Growe*, 507 U.S. at 40 (emphasis added); *Voinovich*, 507 U.S. at 154. By contrast, a smaller minority group that is part of a winning bi-racial coalition merely "influences" electoral outcomes. *Gingles*, 478 U.S. at 46 n.12 (group able to allege "that the [challenged practice] impairs its ability to *influence* elections") (emphasis in original); *accord De Grandy*, 512 U.S. at 1009 (where "members of a minority group are a minority of the voters," they allege that their group is "potentially influential"); *Voinovich*, 507 U.S. at 154 (voters allege "influence-dilution" where they "do not allege that [the challenged plan] prevented black voters from constituting a *majority* in additional districts") (emphasis in original); *Growe*, 507 U.S. at 41 n.5 ("a minority group not sufficiently large to constitute a majority" alleges an "ability to influence, rather than alter, election results").

These cases confirm that the relevant focus under Section 2 is the power of the minority group, not the larger political coalition to which it belongs. Section 2 protects only against *minority* vote dilution or denial of *equal* opportunity, so does not grant to political coalitions supported by minorities any preferential right to representation, proportional or otherwise. Thus, as *Gingles* also emphasized, the "reason" that Section 2 authorizes vote dilution claims only "in districts in which members of a racial minority would constitute a majority of the voters" is to insure that Section 2 will "only protect racial minority votes from diminution proximately caused by the [re]districting; [but] *would not assure racial minorities proportional representation.*" 478 U.S. at 50 n.17 (emphasis in original).

In short, although *Gingles* and subsequent cases technically reserve the question, the opinion's unequivocal statement that only a majority can "elect" within the meaning of Section 2 forecloses the assertion that the statute's prohibition against vote dilution extends to minority groups that can "elect" their preferred representatives only in combination with nonminorities.

3. Moreover, any revision of the first prong of *Gingles* makes nonsense of the other *Gingles* preconditions and converts them into precisely the mandate for proportional representation that the *Gingles* majority eschewed, that the *Gingles* concurrence strongly condemned, and that Section 2 expressly prohibits. 478 U.S. at 75-76; *id.* at 96-97 (O'Connor, J., concurring); *see also* 42 U.S.C. § 1973(b); S. Rep. No. 97-417 (1982), at 28, *reprinted in* 1982 U.S.C.C.A.N. 177, 202-03. According to Appellants, *Gingles* purportedly required a finding of "Section 2 liability where the Anglo bloc 'normally will defeat the *combined* strength of minority support *plus white crossover votes.*'" App. Br. at 34-35 (quoting *Gingles*, 478 U.S. at 56) (emphasis added by Appellants). But this is a quotation of the *third Gingles* precondition—the test for legally

significant white bloc voting—which plaintiffs must always demonstrate in any voting rights case. If all that is required is the *third Gingles* precondition to establish *prima facie* vote dilution, then the first precondition is utterly superfluous and nonsensical.

More important, this *de facto* elimination of the first *Gingles* precondition means that Section 2 effectively requires creation of districts where minorities' preferred representatives are usually elected, at least up to the point of proportionality.[28] Under the other *Gingles* preconditions, all the plaintiff need show is that the minority "supported certain candidates and that those candidates have not usually been elected." *Gingles*, 478 U.S. at 92 (O'Connor, J., concurring). Thus, as Justice O'Connor's *Gingles* concurrence correctly cautions, the *Gingles* preconditions, even *with* the majority-in-a-district requirement, "result[] in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Id.* at 85. *Weakening* that threshold showing by eliminating the first *Gingles* precondition would greatly expand the rough proportionality requirement of *Gingles* beyond areas where a compact minority community can constitute a natural majority, to every area where there is a

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[28] The *Gingles* preconditions do not technically establish a Section 2 violation, since the totality of circumstances must be further analyzed. But where minorities can establish the availability of a compact, "performing" majority district, such a defense succeeds in "only the very unusual case." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993); *see De Grandy*, 512 U.S. at 1012 ("lack of equal electoral opportunity may be readily imagined and unsurprising when demonstrated under circumstances that include the three essential *Gingles* factors"). The only defense that will usually work is that proportionality has been achieved under *De Grandy*, thus confirming that Appellants require representation up to the point of proportionality.

sufficient number of minorities to form any cognizable part of a successful bi-racial coalition electing Democrats.

Furthermore, there simply is no logical stopping point or principled boundary to contain this otiose concept of "dilution." Just as the Legislature was allegedly obliged to choose a 21.4% black voting age population ("VAP") district over a 15% black VAP district (in adjacent District 26), so too must legislatures "increase" black VAP from 5% to 11% if this will provide the winning margin for a Democratic candidate who usually receives 45% to 46% of the vote. *See McNeil*, 851 F.2d at 947. Indeed, there is no reason that "dilution" of a bi-racial political coalition depends at all on any diminution in *minority* percentages, as opposed to diminution of the Anglo members of the Democratic coalition. If minority voters really do have a right to districts where their preferred candidates prevail, this right is plainly violated if the legislature opts for a 20% black district where nonminority voters are predominantly Republican over one with the *same* black percentage, but where nonminorities are principally Democratic (and thus supportive of the minority-preferred candidate). *See O'Lear v. Miller*, 222 F. Supp. 2d 850, 860-61 (E.D. Mich.) (three-judge court) (rejecting this claim brought by counsel for Jackson Appellants), *aff'd*, 537 U.S. 997 (2002).

Thus, far from being an "arbitrary" barrier, the first *Gingles* precondition is a necessary bulwark against an otherwise unbridled concept of minority voting rights, which equates impermissible vote dilution with the failure to maximize the representation of minority-supported candidates, at least up to the point of proportionality. Moreover, the *Gingles* requirement that minorities constitute a potential numerical majority of the population is straightforward and readily calculable, whereas the "coalition" theory would require courts constantly to assess *whether* a certain minority percentage will affect an electoral outcome. This would involve, as then-Judge Breyer aptly noted in rejecting a similar claim, "the very finest of political

judgments about possibilities and effects—judgments well beyond their capacities." *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 412 (1st Cir. 1986).[29] More important, the *Gingles* majority requirement is politically neutral and, as noted, is actually tied to the statutory language because it looks at the opportunities of a protected racial group, not a political coalition. *See supra* pp. 31-34.

C. This Case Illustrates The Invalidity Of The "Coalition" Theory

Appellants' claim here vividly exemplifies all of the inherent problems with trying to construct a "coalitional/effective" or "influence" claim that is not inherently partisan and amorphous.

First, this case demonstrates that Appellants' "coalition" theory either requires a gerrymander on behalf of minority-preferred parties in every district containing any minorities or is essentially incomprehensible. For example, it seems quite clear that Appellants' "coalitional/opportunity" label is equally applicable to the six "other districts where African-Americans and Latinos had exerted significant electoral influence by providing successful candidates their margins of victory." App. Br. at 33 n.26. These districts have combined black and Hispanic VAP ranging from 20.6% to 39.5%, and have black populations up to 20.3% VAP, and Hispanic VAP up to 29%. J.S. 113a (listing "influence" districts); *see* J.A. 337-38. All these districts, like

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[29] *See also Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) ("Nothing but raw intuition could be drawn upon by courts to determine in the first place the size of those smaller aggregations having sufficient group voting strength to be capable of [vote] dilution in any legally meaningful sense and, beyond that, to give some substantive content other than raw-power-to-elect to the concept as applied to such aggregations."); *Ill. Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 715 (N.D. Ill.) (three-judge court), *aff'd*, 506 U.S. 948 (1992); *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991).

"coalitional/opportunity" Districts 24 and 25, have consistently elected white Democrats preferred by minority voters since at least 1992, although, also like Districts 24 and 25, none has elected a black Democrat. Since minorities are a concededly "significant" component of a winning bi-racial coalition in all six of these districts, and are unable to elect their preferred candidate under the legislative plan, it seems clear that they are "coalitional" districts and that their elimination violates Appellants' interpretation of *Gingles*. Yet in the court below and in prior filings in this Court, Appellants seem to dismiss these districts as "influence districts," which do not seem to be independently protected by the Voting Rights Act. J.S. 113a; *see also* J.S. in *Jackson v. Perry*, No. 03-1391, at 17 n.32. But these districts cannot be "influence districts" as that phrase is used in *Ashcroft*, because such districts, unlike "coalitional districts," are ones in which minority voters may well "*not* be able to elect a candidate of choice." 539 U.S. at 482 (emphasis added). Since Appellants can neither articulate nor apply a coherent description of which districts satisfy their understanding of the first *Gingles* precondition, courts obviously cannot apply a limiting principle and thus must find vote dilution everywhere minorities could be the "swing vote" to elect a preferred Democrat, but are not given that opportunity under the challenged plan.

Appellants make much of the fact that black voters allegedly constitute a majority of voters in the Democratic primary in District 24, as if this is somehow talismanic, but it is difficult to see how it is even relevant. Most obviously, no group is ever even potentially able to "control" the electoral process unless it is a majority of voters in *both* the primary and general elections. Here, black voters constitute, at best, only 30% to 33% of voters in the general election and, as noted, do not "control" even the primary. *See* J.S. 110-12a; *supra* pp. 27-29. Consequently, under Appellants' theory, the dividing line between protected "coalition" districts and presumably unprotected "influence" districts is either

unknowable or turns on factors incapable of consistent, principled judicial articulation.

Second, this case well illustrates the inherently imprecise and speculative nature of estimating the minority percentage which will actually provide minorities with a realistic opportunity to elect their preferred candidate. As noted, no black Democrat has even run in District 24, rendering it impracticable to make even a reliable estimate of whether it would be feasible for a black Democrat to be elected. Although District 24 is usually a 55% district for white Democrats (J.A. 100), it might well not be sufficient for a black Democrat because (1) a black v. white Democratic primary contest would likely significantly increase non-black turnout and (2) if there is racial bloc voting where white voters are more reluctant to vote for black candidates, then the vote tallies achieved by white Democrats in general elections will be higher than what a black candidate would receive. Accordingly, estimating the minority and Democratic percentages needed to elect a black candidate in this district is based only on "raw intuition," and requires indulging the fiction that a black Democrat could possibly be elected so long as former Representative Frost is a candidate. *See supra* p. 28.

Third, it is clear that Appellants' conception of minority vote dilution turns far more on the *partisan* composition of the *nonminority* electorate than it does on the percentage of minority voters in the district. Indeed, the only difference between the court-drawn plan and the legislative plan is the partisan composition of Anglos in the various districts, for there is no cognizable difference between the *racial* percentages in the plans. Most generally, the legislature's plan *increased* the number of Hispanic majority districts from 7 to 8, *increased* the number of black representatives from 2 to 3, and maintained the number of Hispanic Democrats elected. Both plans have 11 districts where blacks and Hispanics constitute a majority of the voting age population and 7 districts where those combined groups

comprise from 20% to 25% of the VAP. J.A. 337-38. The legislative plan, in addition, has two *more* districts where the combined black and Hispanic percentage is between 25% and 40%, reflecting, if anything, that it is superior to the court-drawn plan in terms of the minority percentages in the districts. *See id.*

As this reflects, the only alleged flaw in the plan is that the minority community is "submerg[ed]" into a district "dominated by Anglo *Republican* voters" rather than Anglo Democrats. App. Br. at 43 (emphasis added). For example, District 26, which is adjacent to old District 24 and supposedly is a "particularly egregious" example of minority vote dilution, has a black VAP of 15% and a Hispanic percentage of 12.5%, for a combined 27.5% minority representation, which *exceeds* the minority percentage in four of the seven districts which, Appellants said in district court, had provided minorities with "significant electoral influence" in the old plan. J.A. 337-38; App. Br. at 33 n.26; J.S. 113a (identifying Districts 1, 2, 4, 9, 10, 11 and 17 as claimed electoral influence districts). The same is true of six other districts in the Legislature's plan (1, 2, 10, 11, 24 and 32), which have minority representation in excess of 4 to 6 of the old plan's "significant influence" districts.[30] Perhaps most revealingly, District 4 supposedly fails to remain a district where minorities have "significant electoral influence," not because of any appreciable change in minority population, but simply because Representative Hall switched from the Democratic to the Republican party. J.A. 337-38; *compare* J.S. 113a (Appellants included District 4 as one of *seven* influence districts), *with* App. Br. at 33 n.26

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[30] Under the court-drawn plan, Districts 1, 2, 4, and 17 had a combined black and Hispanic VAP of 21.4% or lower, which is less than all six of these legislative districts. *See* J.A. 337-38, *id.* at 338 (legislative District 32 has combined 39.2% VAP, which exceeds that of court-drawn Districts 9 (33.2%) and 11 (29.1%)).

(now arguing that there were "*half a dozen* . . . [influence] districts") (emphasis added). Thus, "submergence" of minority voters into majority-*Democrat* districts purportedly *fulfills* the mandate of the Voting Rights Act, but placing precisely the same minority voters into a majority-*Republican* district is, *ipso facto*, a violation of the Act.

The fact that Appellants' complaint is, at bottom, that the white majorities in the new plan, unlike the court-drawn plan, tend to vote Republican reveals that their challenge has very little to do with minority vote dilution, and everything to do with insuring that the federal judiciary guarantees a certain level of success for the minority-preferred Democratic party.

D. The "Coalition" Theory Is Inconsistent With The Purposes Of Section 2

Appellants' theory is also irreconcilable with the basic purposes of Section 2 and produces results that may actually harm minorities' quest for equal electoral opportunity. First, acceptance of Appellants' conception of "coalitional/ opportunity" districts would mean that here, as in the vast majority of cases, minorities would enjoy proportional or extra-proportional representation under the plan. Under the court-drawn plan, blacks and Hispanics were able to elect their preferred representatives in 17 of 32 districts (53%), but those groups combined constitute only 34.6% of the State's citizen voting age population, which is almost exactly the percentage at which their preferred representatives are elected under the legislature's plan—34.4% (11 of 32). J.A. 188; J.S. 22a. Appellants cannot, of course, contend that Anglo-majority districts which elect minority-preferred candidates are equivalent to majority-minority districts under the *Gingles* preconditions, but somehow suggest that they are not equivalent when assessing the plan's overall proportional representation. If Appellants' idiosyncratic understanding of districts providing an "opportunity to elect" is accepted, virtually every plan will have a number of "opportunity"

districts equal to or exceeding the minority percentage of the population.

Appellants' proposal also departs from the underlying purposes of Section 2 because it is necessarily directed at areas where race-conscious voting by nonminorities is not a serious problem, but would do nothing to provide minority voters relief where white bloc voting remains a persistent barrier. If the area surrounding old District 24 is truly one in which black candidates can be elected when the black voting age population is only 21.4%, then this is necessarily an electorate where white voters will willingly support a minority candidate and thus does not present the sort of "racial and ethnic cleavages" that the Act was designed to eradicate. *De Grandy*, 512 U.S. at 1020. This is in stark contrast to the districts in *Gingles* and elsewhere, where whites would not vote for minority candidates, so there was a demonstrable need for minorities to constitute a majority in order for them to elect their preferred candidate. Indeed, under Appellants' own estimates, the white "crossover rate" in District 24 is "roughly 30%." App. Br. at 42 n.34. As the court below correctly noted, this Court has held that crossover voting of between 22% and 38% is not racial bloc voting as a matter of law. *See Abrams v. Johnson*, 512 U.S. 74, 92-93 (1997); J.S. 111a n.115 (citing *Abrams*); *see also Voinovich*, 507 U.S. at 151-52, 158 (affirming lower court finding of no racial bloc voting where "black candidates have been repeatedly elected from districts with only a 35% black population"). As this reflects, Appellants' proposed rule has the perverse effect of penalizing those areas where colorblind, high-"crossover" voting by whites enables minority-preferred candidates to win in majority-white districts, while simultaneously exempting those areas where whites continue to refuse to vote for candidates of a different race because, in those jurisdictions, there will not be sufficient white crossover to aid minorities in the proposed bi-racial coalition.

Moreover, as virtually every lower court has noted, Appellants' theory is contrary to Section 2's purpose because it requires the federal judiciary to create or preserve districts that tend to favor Democrats, especially white Democrats. Here, Appellants contend that the failure to preserve or create the Democratic-gerrymandered District 24 constitutes vote dilution requiring judicial correction. The lower courts have consistently rejected this transparent effort to conscript the federal judiciary into rearranging districts "to make the congressional races more competitive for [D]emocratic candidates" because the "Voting Rights Act does not guarantee that the nominee of the Democratic party will be elected, even if black voters are likely to favor that party's candidates." *Smith v. Clark*, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002); *Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992); *see also Hall v. Virginia*, 385 F.3d 421, 430-32 & n.13 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1725 (2005); *Nixon*, 76 F.3d at 1392; *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643-44 (D.S.C. 2002) (three-judge court).

Finally, Appellants' theory is contrary to the purposes of the Act and the Fourteenth Amendment because it requires that courts and legislatures become "fixated on race" in drawing virtually every district. App. Br. at 42 (quoting dissenting opinion below). Contrary to Appellants' absurd contention, race-conscious line-drawing and balkanization is necessarily *increased* if courts require "coalitional" districts wherever there is any minority presence and a preferred Democratic candidate can win, *in addition* to areas where minorities form a natural majority. If a legislature must constantly tinker with minority percentages between 15% and 40% to avoid liability, then race will be a "predominant factor" in virtually every redistricting decision. *See Miller*, 515 U.S. at 916. Consequently, virtually every redistricting decision will pose a Hobson's choice between violating *Shaw* or defending against a Section 2 challenge. In addition, the federal judiciary is not equipped, or authorized

under *Ashcroft*, to dictate to state legislatures whether racial harmony is better achieved in a 15% black VAP district than it would be in a 21.4% district mandated by judicial fiat. If the Court is concerned, as was the *Gingles* concurring opinion, that the *Gingles* preconditions tilt too far towards requiring a proportional number of majority-minority districts, this situation can only be exacerbated by, as Appellants suggest, eliminating the first *Gingles* prong and mandating "coalitional" districts everywhere there is a cohesive minority group of any size.

E. The "Coalition" Theory Is Inconsistent With Other Precedent

Contrary to Appellants' misleading brief, no decision of this Court has ever suggested any support for Appellants' proposed revision of the first *Gingles* prong, and every circuit court and three-judge court confronting such an argument, save one, has expressly rejected it. All of the cases cited by Appellants reflect, at most, the universally accepted reality that a candidate preferred by minority voters *can* succeed in a majority-white district, but none suggest any *right* to such districts, or that such a right can be reconciled with the first *Gingles* precondition.

Most obviously, as the court below correctly noted, Appellants' contention that the *Ashcroft* decision somehow authorizes Section 2 "coalition" suits "turns the principle of [that case] on its head." J.S. 112a. Specifically, *Ashcroft* authorized state legislatures, even under the stringent requirements of Section 5 of the Voting Rights Act, to *voluntarily* create "coalitional" or "influence" districts *in place of* majority-minority districts—thus substantially *enhancing* state legislative autonomy to redistrict free from federal judicial interference. Although Section 5, unlike Section 2, bluntly "insure[s]" preservation of "current minority voting strength," States are nevertheless free to *reduce* the number of majority-minority districts, creating "fewer minority representatives" and more districts where

"minority voters may not be able to elect a candidate of choice." *See Ashcroft*, 539 U.S. at 477, 482-83; *see also id.* at 491 (Kennedy, J., concurring) ("[C]onsiderations of race that would *doom* a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.") (emphasis added). Such redistricting decisions constitute a "political choice," and state legislatures, not the federal judiciary, are the entities empowered in a democratic society to "choose one theory of effective representation over the other." *Id.* at 482-83 (majority op.). Accordingly, "Section 5 does not dictate" whether the State "chooses to create a certain number of 'safe' districts" or "choose[s] to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice." *Id.* at 480.

Here, the Texas Legislature, like the Georgia Legislature in *Ashcroft*, simply chose among competing theories of effective representation and, unlike Georgia, chose a plan which optimized minority voting power in the traditional sense. That is, it opted for a plan which replaced two districts—Districts 24 and 25—where a black candidate had never been elected, with District 9, which predictably resulted in the election of a black-supported black candidate over a white incumbent. J.A. 338. Since Appellants concede that the 2001 judicial plan complies with Section 2 (and advance it as a remedial alternative), this necessarily means that the legislative plan also complies because it simply modifies the 2001 plan to exercise the choice expressly blessed by *Ashcroft*. That is, it simply replaced two districts where the ability of black voters to elect a preferred candidate of their own race was (at least) doubtful, with one where the black-preferred black candidate is quite likely to be elected. Since that decision does not violate even the stringent non-retrogression commands of Section 5,

a fortiori it cannot violate Section 2's equal opportunity requirement.[31]

Nor does the *De Grandy* opinion in any way relax the first *Gingles* precondition. Appellants focus on a sentence in *De Grandy* that states that the first *Gingles* prong requires "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S. at 1008; App. Br. at 35. This sentence, however, is fully consistent with the holding of *Gingles* that the minority population must constitute a numerical majority in order to be "sufficiently large . . . to elect the candidates of its choice." 478 U.S. at 50 & n.17. Indeed, the sentence in *De Grandy* directly preceding the quoted sentence establishes that *De Grandy* was not seeking to relax the numerical majority requirement: "The dispute in this litigation centers on . . . whether Hispanics are sufficiently numerous and geographically compact to be a *majority* in additional single-member districts, as *required* by the first *Gingles* factor. . . ." 512 U.S. at 1007 (emphasis added); *see also id.* at 1014 n.11 ("'Proportionality' as the term is used here links the number of *majority-minority* voting districts to minority members' share of the relevant population.") (emphasis added).

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[31] Appellants assert that the "Houston district has no relevance to a Section 2 challenge to the elimination of a district hundreds of miles away." App. Br. at 40 n.31. But *Ashcroft* made clear that states are entitled to choose a plan with one stronger black opportunity district rather than two weaker districts. *Ashcroft*, 539 U.S. at 481-83. Since the State could not have increased black voting strength in the Dallas/Fort Worth district, Appellants' claim is that it was required *both* to enhance the Houston district *and* to preserve District 24. This cannot be correct. It both runs afoul of *Ashcroft*'s holding that "gains in the plan as a whole" may offset losses in particular districts, 539 U.S. at 479, and impermissibly establishes maximization as the Section 2 mandate, *see De Grandy*, 512 U.S. at 1017 ("Failure to maximize cannot be the measure of § 2.").

Equally inapposite are the lower court cases simply holding either that the racial percentages of majority-minority districts may be reduced if white bloc voting is insufficient to defeat the minority-preferred candidate in the new districts, or that the presence of such less-than-majority districts should be considered as defenses in evaluating Section 2 challenges.[32] The fact that States are free to create minority-minority districts, and to use such districts as an affirmative defense to Section 2 challenges, cannot rationally suggest that such districts may be imposed by judicial fiat. Although legislatures are free to seek proportionality and may cite proportional representation as a defense to a Section 2 claim, Section 2, by its terms, does not *require* such proportionality. *See De Grandy*, 512 U.S. at 1020 n.17. Moreover, contrary to Appellants' knowingly false assertion that the Justice Department has consistently opposed the *Gingles* majority-in-a-district requirement, it has, in fact, urged this Court to "agree with those courts who have rejected [the] notion" that "Section 2 requires creation of districts in which minorities are demonstrably *not* the majority of the voting age population." Br. of the United States as *Amicus Curiae*, *Voinovich v. Quilter*, 507 U.S. 146 (1993) (No. 91-1618) (emphasis in original). Finally, although Appellants simply ignore this tsunami of precedent, the lower federal courts, with one insignificant exception,

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[32] *See Page v. Bartels*, 144 F. Supp. 2d 364, 366 (D.N.J. 2001) (three-judge court) (plaintiffs failed to establish "a white bloc vote . . . [that] normally will defeat the combined strength of minority support plus white 'crossover' votes"); *Martinez v. Bush*, 234 F. Supp. 2d 1275, 1322 (S.D. Fla. 2002) (three-judge court) (rejecting claim where *challenged* district would "usually . . . result in the election of [] minority candidates of choice"); *Rural W. Tenn. Af.-Am. Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1101 (W.D. Tenn.) (deciding that influence districts weigh against finding of Section 2 violation, but not deciding whether "§ 2 entitles minority groups to an influence district even if they cannot satisfy the first *Gingles* precondition"), *aff'd*, 516 U.S. 801 (1995).

have uniformly and consistently rejected claims challenging the failure to create districts where minorities are less than a majority, but can form a winning bi-racial coalition.[33]

CONCLUSION

The judgment should be affirmed.

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[33] Significantly, the Court has summarily affirmed two of these decisions where the issue was presented on appeal. *Parker v. Ohio*, 263 F. Supp. 2d 1100, 1104-05 (S.D. Ohio) (three-judge court), *aff'd*, 540 U.S. 1013 (2003); *Turner v. Arkansas*, 784 F. Supp. 553, 569-70 (E.D. Ark. 1991) (three-judge court), *aff'd*, 504 U.S. 952 (1992); *see also Hall*, 385 F.3d at 430-31; *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 851, 852-53 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998), *cert. denied*, 525 U.S. 1138 (1999); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *Nixon*, 76 F.3d at 1389; *Romero v. City of Pomona*, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989); *McNeil*, 851 F.2d at 942; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 374-79 (S.D.N.Y.) (three-judge court), *aff'd*, 543 U.S. 997 (2004); *O'Lear*, 222 F. Supp. 2d at 861; *Cano v. Davis*, 211 F. Supp. 2d 1208, 1231 (C.D. Cal. 2002) (three-judge court), *aff'd*, 537 U.S. 1100 (2003); *Colleton County Council*, 201 F. Supp. 2d at 642-44; *Smith*, 189 F. Supp. 2d at 537; *Balderas v. Texas*, No. Civ. A. 6:01CV158, 2001 WL 34104836, at *2 (E.D. Tex. Nov. 28, 2001) (three-judge court), *aff'd*, 536 U.S. 919 (2002). Indeed, only one court of appeals has allowed for the theoretical possibility that a vote-dilution claim may be brought by a numerical minority. *See Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004) (en banc). But the divided *Metts* court did so only tentatively, until "courts get more experience dealing with these cases and the rules firm up," and it failed to articulate any standard that would govern such a claim. *See id.* at 11. Moreover, *Metts*' conclusion that the minority percentage issue be resolved under "totality of circumstances" analysis cannot be reconciled with the fact that "[t]he *Gingles* preconditions act as a sentry at the gates—a bright-line rule that must be satisfied *before* the totality of circumstances comes into play." *Metts v. Murphy*, 347 F.3d 346 (withdrawn following grant of reh'g en banc), 2003 WL 22434637, at *17 (1st Cir. Oct. 28, 2003) (Selya, J., dissenting).

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In The
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *ET AL.*,

Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*

TRAVIS COUNTY, TEXAS, *ET AL.*,

Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*

EDDIE JACKSON, *ET AL.*,

Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*

GI FORUM OF TEXAS, *ET AL.*,

Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, *ET AL.*

On Appeal from the United States District Court for the Eastern District of Texas

---

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QUESTIONS PRESENTED

1. Whether the 2003 Texas redistricting – which replaced an antimajoritarian court-drawn map that had "perpetuated" much of a 1991 Democratic Party gerrymander with a map that resulted in a congressional delegation better reflecting the State's voting patterns – constituted an unconstitutional partisan gerrymander under this Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

2. Whether so-called "mid-decade" or "voluntary" redistricting is constitutionally impermissible, either in conjunction with an alleged partisan gerrymander or as a derivative consequence of this Court's one-person, one-vote standards.

3. Whether the district court's finding that §2 of the Voting Rights Act was not violated by the alteration of specific districts in the 2003 map – in particular old Congressional Districts 24 and 23, neither of which was found to be controlled by minority voters – was clearly erroenous.

4. Whether the district court's finding that the creation of new Congressional District 25 did not constitute an unconstitutional racial gerrymander was clearly erroneous.

5. Whether the district court's finding that §2 of the Voting Rights Act did not obligate the State of Texas to create seven out of seven districts in South and West Texas as Hispanic opportunity districts was clearly erroneous.

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STATEMENT OF THE CASE

A. Factual Background

Texas's current congressional map is the natural result of four decades of Texas political history, during which the voting preferences of Texas voters have shifted decidedly. J.S., at 10a-13a.[1] The district court, which was familiar with the history of Texas politics and heard extensive testimony regarding its details in both 2001 and 2003, described Texas's recent political history as "the story of the dominance, decline, and eventual eclipse of the Democratic Party as the state's majority party." J.S., at 10a.

The district court noted that from Reconstruction until the early 1960s, the Democratic Party "dominated the political landscape in Texas." J.S., at 10a-11a. And, although Republican John Tower was elected to the United States Senate in 1961, Republican voting strength in Texas remained at approximately 35% throughout the 1960s and 1970s. J.S., at 11a. In the nine election cycles from 1962 through 1978, Republicans never won more than four congressional seats, while the Democrats never won fewer than twenty. J.S., at 11a, 42a. When William Clements, Jr., was elected Governor of Texas in 1978 – becoming the first Republican elected since 1874 – the Democrats that year still won twenty of the twenty-four congressional races and garnered 56% of the vote in statewide races. J.S., at 11a. The Republican Party steadily gained strength throughout the 1980s and, by 1990, approached the Democrats' level of support, gaining 47% of the statewide vote while the Democrats garnered 51%. J.S., at 11a. But congressional representation continued to lag behind statewide voting strength, with the Democrats winning 19 of the 27 seats in the 1990 election. J.S., at 11a.

In 1991, Texas was awarded three additional seats in the House of Representatives as a result of the 1990 decennial

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[1] Each of the jurisdictional statements included at least one of the district court's opinions in this case, and those opinions were not again reproduced in the Joint Appendix. For ease of reference, this brief will refer to the copies of the district court's opinions found in the jurisdictional statement filed by the Jackson Appellants, using the citation form "J.S., at ___a."

census. *See* J.S., at 42a. At that time, both Houses of the Texas Legislature were controlled by the Democratic Party, J.S., at 12a, 20a, as was the governorship of the State.[2] The congressional redistricting plan enacted later that same year – the design of which has been credited in large part to Appellant Congressman Martin Frost – was described by experienced and neutral observers as the "shrewdest" Democratic gerrymander of the 1990s. J.S., at 20a (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2002, at 1448); *see also* J.S., at 20a (quoting MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1510 ("The [Texas 1991 congressional redistricting] plan carefully constructs Democratic districts with incredibly convoluted lines and packs Republican suburban areas into just a few districts.")). Indeed, approval of Frost's plan came "despite the objections of some ethnic minorities that the plan favor[ed the] protection of incumbents over the creation of solidly minority districts." *Redistricting – State Update: TX*, THE HOTLINE, Aug. 21, 1991.

Following enactment of the 1991 plan, a number of Republicans challenged the plan as an unconstitutional partisan gerrymander, relying on *Davis v. Bandemer*, 478 U.S. 109 (1986). *See Terrazas v. Slagle*, 789 F.Supp. 828 (W.D. Tex. 1992) (*"Terrazas I"*). The district court denied the request for preliminary relief and permitted the 1992 elections to be conducted under the 1991 map. *Id.*, at 834-35. The 1991 gerrymander lived up to its billing. In 1992, the Democrats received a 49.9% plurality of the vote in the 30 congressional races – compared to the Republicans' 47% – yet the Democrats won a 21 to 9 majority in the Texas congressional delegation.[3]

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[2] Governors of Texas, Texas State Library & Archives Commission website, *available at* http://www.tsl.state.tx.us/ref/abouttx/governors.html.

[3] Election returns for the years 1992 to 2006 are publicly available on the website of the Texas Secretary of State. The web address of the elections database is http://elections.sos.state.tx.us/elchist.exe (last visited Jan. 31, 2006). When this brief cites to election returns that appear on this website, reference will be made back to this database as the "Election Returns Database."

Following the 1992 elections, the district court requested the *Terrazas* parties to file motions for summary judgment to dispose of the case. *See Terrazas v. Slagle*, 821 F.Supp. 1162, 1166 (W.D. Tex. 1993) ("*Terrazas II*"). Upon the state defendants' motion for summary judgment alleging the plaintiffs failed to set out a *prima facie* case under *Bandemer*, *id.*, at 1172 – and with the added benefit of having seen the plan's performance in the 1992 elections – the district court granted the motion with respect to the partisan gerrymandering claim. *Id.*, at 1175. The court read *Bandemer* to require the plaintiffs to show that they could not "over the long haul counteract [the congressional map] through [their] influence in another relevant political structure or structures." *Id.*, at 1174.

The court found the plaintiffs did not show that they could not influence the state political process because the Governor, who could veto redistricting legislation, was elected statewide and was not subject to the gerrymandered map. *Id.* Also, through winning enough seats in subsequent legislatures, the Republicans could influence congressional districting plans. *Id.*, at 1174 & n.16. The *Terrazas* court's admonition to the Republicans was simple: because they were not foreclosed from winning election to state offices that control congressional districting, they were not unable to influence congressional districting legislation. Therefore, the plan was upheld. *Id.*, at 1176.

The 1990s unfolded as the *Terrazas* court projected that they might. Although Democrats continued to win a majority of the seats in Texas's congressional delegation under the gerrymandered plan – despite ever growing majorities of votes cast for Republicans[4] – the Republicans

[4] From 1994 to 2002, Republicans earned a clear majority of the statewide vote, yet under the antimajoritarian districting plan their strength in Texas's congressional delegation lagged behind. *See* J.S., at 42a (district court's table depicts that the Republicans' steady increase in statewide strength did not result in comparable gains in the congressional delegation). In 1994, the Republicans held a 52% to 47% statewide advantage, but the Democrats won a 19 to 11 majority in the congressional delegation. *See* J.S., at 42a. In 1996, the Republicans' statewide advantage

(Continued on following page)

did begin to gain power in other "relevant political ... structures," *Terrazas II*, 821 F.Supp., at 1174. "[B]y 1990, the Republican Party had nearly achieved parity with the Democratic Party." J.S., at 11a. And in the mid-1990s the Republicans began to dominate statewide races. Indeed, the 1994 election cycle marked the last time a Democrat won a statewide election in Texas.[5] Since then, every election for one of Texas's 27 elective statewide offices[6] has been won by a Republican.[7] Nor has any Democrat been successful in any recent statewide bid to win a federal election – President or United States Senator – in Texas. Lloyd Bentsen, who won re-election to the United States Senate in 1988 was the last to do so.[8]

A similar shift occurred in the make-up of the Texas Legislature. During the 74th Legislature in 1995, Democrats controlled the Senate, 17 to 14, and the House, 87 to

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was 55% to 44%, but Texas's congressional delegation was 16 Democrats and 14 Republicans. *See* J.S., at 42a. In 1998, the Republican advantage increased to 56% to 44%, but it was the Democrats who gained an extra seat, leaving the delegation at 17 Democrats to 13 Republicans. *See* J.S., at 42a. In 2000, the Republicans had a statewide advantage of 59% to 40%, but the congressional delegation remained 17 to 13 in the Democrats' favor. *See* J.S., at 42a. And in 2002, the court-drawn redistricting plan yielded a 17 to 15 Democratic advantage, despite the Republicans' 57% to 41% statewide strength. *See* J.S., at 42a; *see also* Election Returns Database, *supra* note 3 (providing, for each year, statewide totals for votes cast for Congress – which also show strong Republican majorities).

[5] *See* Election Returns Database, *supra* note 3.

[6] The twenty-seven Texas officials elected in statewide elections are: nine Justices of the Supreme Court, *see* TEX. CONST. art. V, §2; nine Judges of the Court of Criminal Appeals, *see id.*, §4; Governor, Lieutenant Governor, Attorney General, Comptroller of Public Accounts, Commissioner of the General Land Office, *see id.*, at art. IV, §§1-2; three Railroad Commisioners, *see id*, at art. XVI, §30; and the Commissioner of Agriculture, TEX. AGRIC. CODE §11.004.

[7] The Republican candidate for governor in 2002 prevailed with 58 percent of the vote, *see* Election Returns Database, *supra* note 3, and the Republican candidate for governor in 1998 garnered 69 percent of the statewide vote, *id.*

[8] *Id.*; *see also* U.S. Senate, Senators from Texas, *available at* http://www.senate.gov/pagelayout/senators/one_item_and_teasers/texas.html.

63.[9] By 1997, Republicans took control of the Texas Senate and began to make gains in the Texas House of Representatives.[10] For the 78th Legislature in 2003, Republicans took control of the House, 88 to 62, and extended their majority in the Senate to 19 to 12.[11] By 2003, Republicans held all 27 statewide elected offices and held significant majorities in both Houses of the State Legislature.[12] But in the 2002 elections, Texas's congressional delegation remained 17 to 15 in favor of the Democrats.[13]

The 2001 Court-Drawn Plan

In 2001, the State was awarded two new congressional seats as a result of federal reapportionment of seats after the decennial census. J.S., at 206a. The Texas Legislature deadlocked on the question of how to draw congressional districts in its regular session.[14] After litigation in state court,[15] a federal district court undertook the task of

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[9] *See* Legislative Reference Library of Texas, 74th Legislature (1995)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile74.html.

[10] *See* Legislative Reference Library of Texas, 75th Legislature (1997)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile75.html.

[11] *See* Legislative Reference Library of Texas, 78th Legislature (2003)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile78.html.

[12] *See* Election Returns Database, *supra* note 3.

[13] *See id.*

[14] In 2001, the Texas Legislature was still divided by party, with Democrats still controlling the Texas House of Representatives. Those legislators had been elected in 2000 using district lines based on 1990 census data from a time when Democrats controlled the process. *See* J.S., at 12a, 20a. After the legislative lines were adjusted in 2001 by the Legislative Redistricting Board – a statewide-elected body that has the power to redraw state-level districts but not congressional districts, *see* TEX. CONST. art. III, §28 – Republicans controlled both houses of the Texas Legislature in the 2002 elections. *See* Legislative Reference Library of Texas, 78th Legislature (2003)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile78.html.

[15] The Texas Supreme Court rejected a plan that had been drawn by a lower state court because it had not been adopted as a final

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adding those two new seats to Texas's congressional map while readjusting the map to account for the new block-level census data regarding population. J.S., at 206a.

In that litigation, styled *Balderas v. State of Texas*, numerous plaintiffs vigorously contested the appropriate contours of the court-drawn map. J.S., at 202a-03a. Nevertheless, the three-judge panel "refused suggestions not required by law and rejected policy choices better left to legislative consideration." J.S., at 59a.[16] The court engaged in a neutral, low-impact line-drawing process, carefully eschewing changes that might have appealed to any individual judge's sense of political fairness – instead, the panel "wisely" left the decision to implement such changes "to the political arena." J.S., at 210a; *see also* J.S., at 21a.

The court began its new map by drawing the old majority-minority districts as they had been before. J.S., at 206a. Next, it added the two new districts allocated to Texas under the 2000 census numbers, placing "them where the population that produced the new additional districts [had] occurred," in Dallas and Harris Counties. J.S., at 206a. In drawing the remaining lines, the court "looked to general historic locations of districts in the state," with the natural consequence that most "districts fell to their long-held areas."[17] J.S., at 207a.[18]

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judgment of that court. *See Perry v. Del Rio*, 67 S.W.3d 85, 95 (Tex. 2001); J.S., at 204a.

[16] J.S., at 57a, 201a. Due to a rather unusual procedural history, the instant case is a direct continuation of the 2001 *Balderas* litigation. In challenging the 2003 redistricting, several plaintiffs returned to the *Balderas* court and argued that the new map violated the court's 2001 order. The *Balderas* case, in turn, was consolidated with several new lawsuits that were also filed challenging the 2003 map, and all the proceedings were tried together before the same three-judge court, consisting of Judge Higginbotham, Judge Ward, and Judge Rosenthal (the latter of whom replaced Judge Hannah from the original *Balderas* panel).

[17] Although the 1991 districting plan had been previously modified by a federal court, the resulting map left intact the bulk of the political choices made by the Legislature in drawing the 1991 map. In 2001, the

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Finally, the court carefully examined its map to ensure that its lines were not "avoidably detrimental" to the three most senior members of each major party's congressional delegation,[19] and to confirm that "no incumbent was paired with another incumbent or significantly harmed by the plan." J.S., at 208a.

The district court's neutral process, "while shorn of partisan motive," nevertheless "had political impact in the placement of every line." J.S., at 21a. This was because the court's minimalist approach to drawing the new lines meant – as the court expressly found below – that, as a practical matter, "the plan produced by this court *perpetuated much of the 1991 Democratic Party gerrymander*." J.S., at 13a (emphasis added); *see also* J.S., at 21a, 22a.

Both African-American and Hispanic plaintiffs urged the *Balderas* panel to draw new majority districts for their respective minority populations – the Hispanic plaintiffs insisted that the court-drawn plan "contain seven Latino registration majority districts" in South and West Texas, and the African-American plaintiffs argued for a new African-American opportunity district in the Houston area. J.S., at 211a. The panel found that neither group had demonstrated that, in the absence of their proposed districts, their voting strength would be diluted in violation of §2 of

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federal court plan likewise added two seats while causing the least disruption possible to the existing plan, J.S., at 207a; *see also* J.S., at 208a ("It was plain that . . . no incumbent was paired with another incumbent or significantly harmed by the plan."). As a result, all 28 incumbents who ran for reelection retained their seats. Thus, the basic political choices embodied in the Legislature's 1991 plan remained intact throughout the 1990s, preserving the districts, many of which had been drawn to be non-competitive, of incumbent Democratic members of Congress.

[18] As the district court later explained, "[o]nce the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas . . . the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote." J.S., at 21a.

[19] Congressman Martin Frost, of old District 24, was at that time one of the three most senior Democratic members of Texas's congressional delegation. He testified that he believed that the district court had drawn his district to protect him for that reason. J.A., at 248.

the Voting Rights Act. J.S., at 211a. And, recognizing that both groups "present[ed] competing positions, reflecting a political reality that they are competitors in the political process," J.S., at 211a, the court declined to accommodate their requests.

Whether to draw another majority-minority district, either for African-Americans or for Hispanics, the court reasoned, was "a quintessentially legislative decision, implicating important policy concerns." J.S., at 209a. Therefore, the panel noted, "[t]he matter of creating such a permissive district is one for the legislature." J.S., at 212a.

After completing its "unwelcome" task of drawing a remedial map, J.S., at 202a, the court "ultimately ordered that Plan 1151C would govern the 2002 congressional elections." J.S., at 60a. Plaintiffs representing certain Hispanic voters appealed to this Court, "arguing that the panel erred by not drawing an additional Hispanic district in the Southwest region of the state." J.S., at 60a. The Court summarily affirmed. J.S., at 60a.

In the 2002 election, the *Balderas* court's map, reflecting its lineage "perpetuating" the 1991 gerrymander, translated a 53.3% to 43.9% Republican majority of the votes cast for Congress into a 17 to 15 Democratic majority in the congressional delegation.[20]

The 2003 Redistricting Plan

In 2003, for the first time in over a decade, the Texas Legislature passed a congressional redistricting plan, Plan 1374C. But not without some difficulty. In May 2003, late in the Regular Session of the 78th Legislature, a group of Democrats in the Texas House of Representatives left the State, spending four days in Oklahoma to prevent a quorum and avoid redistricting legislation.[21] The session ended without passing a redistricting plan, and so Governor Rick

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[20] *See* Race Summary Report 2002 General Elections, *available at* Election Returns Database, *supra* note 3.

[21] *See* Tr. 12/15/03 PM, at 75:23-77:7 (Rep. Richard Raymond); *see also* J.S., at 60a.

Perry called a special session of the Legislature to take up redistricting. Although the House passed a new plan in that session, the informal Senate tradition of requiring a 2/3 vote to take up legislation allowed the Senate Democrats to prevent a vote on the House's plan.[22] In a second special session, Lieutenant Governor Dewhurst announced that the practice of requiring a super-majority vote to take up a bill would not be used for redistricting legislation[23] – and this time twelve Democratic Senators left Texas, spending a month in New Mexico to prevent a quorum in the Senate.[24] Thus, over the course of three legislative sessions, the minority party was systematically able to prevent the majority party's attempt to replace an antimajoritarian congressional map.

When one Democratic Senator chose to return to Texas following the second called session, Governor Perry called a third special session. It was during this session that Plan 1374C, the first legislatively-drawn congressional map produced for the State of Texas in more than twelve years, was enacted. *See* J.S., at 60a.

The trial record confirms that Plan 1374C – did not result from any single motivation, be it partisan or otherwise. Many of the choices about where to draw district lines were made out of respect for local political boundaries. For example, the Legislature decided to keep the City of Arlington, a city in

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[22] *See* J.S., at 60a.

[23] Eleven Democratic legislators filed suit in federal district court alleging that the decision not to invoke the 2/3-vote informal tradition in the Texas Senate was a change in the rules governing voting requiring §5 preclearance by the Department of Justice. The Department of Justice concluded that it was not; the three-judge court, in turn, found that Dewhurst's decision would "affect the distribution of power between legislators of two different parties" rather than "directly affect the voters," and so preclearance was not required. *Barrientos v. Texas*, 290 F.Supp. 740, 740 (S.D. Tex. 2003) (three-judge court). This Court summarily affirmed. *Barrientos v. Texas*, 541 U.S. 984 (2004).

[24] *See* Tr. 12/17/03 PM, at 119:3-17 (Sen. Royce West) ("So we felt compelled to use that rule to leave the State of Texas in order to make sure that no business would be conducted, specifically the business of redistricting the State of Texas."); *see also*, J.S., at 60a.

Tarrant County between Dallas and Fort Worth that has a history of being split into multiple districts, whole within CD 6.[25] It decided to keep the City of Harlingen, in the southern region of the State, whole in CD 15.[26] And it chose to keep certain small, rural counties in East Texas whole in CD 5,[27] and Jefferson County whole within CD 2.[28]

The Legislature also honored many requests to keep particular cities and counties within particular districts. For example, Parker and Wise counties were placed in CD 12 at the request of a state representative from Parker County.[29] Aransas County was "put back into CD 14 historically where it had been."[30] Portions of Harris and Fort Bend counties were restored to CD 18, the district held by Democratic Congresswoman Sheila Jackson Lee.[31] Angelina County, which preferred not to be placed with The Woodlands and Montgomery County, was placed into CD 1 with about a dozen East Texas counties.[32] Other similar requests were honored.[33]

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[25] *See* Tr. 12/18/03 AM, at 77:14-25 (Bob Davis) (noting that Rep. Grusendorf would not support any plan that split Arlington into multiple congressional districts); *id.*, at 103:19-21; J.A., at 282.

[26] *See* Tr. 12/18/03 AM, at 83:13-84:14 (Bob Davis).

[27] *See* Tr. 12/18/03 AM, at 97:7-12; 100:20-22 (Bob Davis) (noting that this was done at the request of Senator Staples).

[28] *See* Tr. 12/18/03 AM, at 97:24-98:3 (Bob Davis).

[29] *See* Tr. 12/18/03 AM, at 79:19-24 (Bob Davis) (noting that this was done at the request of Representative Phil King); *id.*, at 108:12-14.

[30] *See* Tr. 12/18/03 AM, at 89:20-22 (Bob Davis).

[31] *See* Tr. 12/18/03 AM, at 94:20-95:8 (Bob Davis); Tr. 12/18/03 PM, at 242:17-243:6 (Bob Davis).

[32] *See* Tr. 12/18/03 AM, at 97:17-21 (Bob Davis).

[33] *See also* Tr. 12/18/03 AM, at 99:8-22 (Bob Davis) (explaining that a deal made between Senator Shapiro and Senator Ratliff resulted in Congressional District 3 including part of Dallas County, as it historically had, and Congressional District 4 avoiding Dallas County); Tr. 12/18/03 AM, at 100:15-20 (Bob Davis) (noting that, at Senator Staples's request, Dallas County's influence in Congressional District 5 was reduced to make the district more rural).

Other decisions placed constituencies in a particular district. Congressman Lamar Smith wanted the University of Texas in his district, CD 21.[34] Requests were also honored to place Texas State University, a smaller public university approximately thirty miles away, in a different district than the University of Texas.[35] Fort Hood and the agricultural areas in Coryell, Hamilton, and Erath counties were placed in CD 31.[36]

The record also shows that Democratic legislators played an active role in these decisions. Indeed, Plan 1374C honored a number of the Democrats' requests. African-American Democratic Representative Glenn Lewis requested that his Texas House District be kept whole, and the leadership in the Texas House committed to honoring that request.[37] Thus, legislative district 95 was placed in CD 26.[38] At the request of Hispanic Democratic Senator Hinojosa, the cities of Mission and Edinburg were kept whole.[39] The southern Dallas suburbs of DeSoto and Lancaster were added into CD 30, Congresswoman Eddie Bernice Johnson's district.[40] African-American Democratic Representative Ron Wilson's legislative district was kept whole and placed in CD 9, the new Houston-area African-American opportunity district.[41] And Hispanic Democratic Representative Vilma Luna, a member of the Redistricting Committee,[42] requested that CD 27 reach further north and

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[34] *See* Tr. 12/18/03 AM, at 113:10-20 (Bob Davis).

[35] *See* Tr. 12/18/03 AM, at 90:20-91:13 (Bob Davis).

[36] *See* Tr. 12/18/03 AM, at 121:21-122:3 (Bob Davis); *see also* J.A., at 282-83 (explaining that economic considerations regarding Wise County led it to be placed in Congresswoman Kay Granger's district).

[37] *See* Tr. 12/18/03 AM, at 78:1-9 (Bob Davis); J.A., at 282.

[38] *See* Tr. 12/18/03 AM, at 76:23-77:4 (Bob Davis).

[39] *See* Tr. 12/18/03 AM, at 89:2-16 (Bob Davis).

[40] *See* Tr. 12/18/03 AM, at 120:8-14 (Bob Davis).

[41] *See* Tr. 12/18/03 PM, at 68:10-12 (Rep. Wilson).

[42] *See* Tr. 12/18/03 PM, at 139:10 (Rep. King).

that it include economic interests such as the northern part of the Port of Corpus Christi and the port of Ingleside.[43]

The map that the Legislature adopted, Plan 1374C, went from two African-American opportunity districts (old CDs 18 and 30) to three (new CDs 9, 18, and 30), and from seven majority Hispanic voting-age population (VAP) districts to eight.[44] For that reason, some legislators referred to the new map as an "8-3" map, replacing the prior "7-2" map.[45] Although Plan 1374C did increase minority-opportunity districts, it also eliminated the 1991 gerrymandered lines protecting Anglo Democrats, which resulted in strong Democratic opposition to the plan.

In the end, two Democrats, Representatives Ron Wilson and Vilma Luna voted for Plan 1374C. Representative Wilson, an African-American Democrat from Houston, voted for the redistricting plan because, as he testified, the plan would provide an additional opportunity for African-Americans to elect a member of Congress and "advance the interests of my community." J.A., at 276-78, 281. Representative Luna, an Hispanic Democrat originally from the South Texas town of Alice, Texas, also voted for the plan. The bill containing Plan 1374C was enacted in October 2003. *See* H.B. 3, 78th Leg., 3d C.S. (2003).

Appellants and other plaintiffs who disagreed with the Legislature's policy choices immediately filed suit seeking to freeze in place the policy choices embodied in the prior map or – in the case of the GI Forum Appellants – to force the State to adopt an entirely new map.

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[43] *See* Tr. 12/18/03 AM, at 110:14-18, 118:4-15 (Bob Davis).

[44] Although the Hispanic citizen voting-age population (CVAP) in old CD 23 was reduced under 50%, Plan 1374C created new CD 25, which also had Hispanic CVAP over 50% and which, unlike CD 23, regression analyses demonstrated would be controlled by Hispanic voters. J.S., at 136a, 139a, 147a-48a.

[45] *See, e.g.*, Tr. 12/18/03 PM, at 178:16-18 (Rep. King).

B. Proceedings In This Litigation

1. *Session v. Perry*

The plaintiffs brought a broad array of challenges against the State's plan. They argued that, either by constitutional provision or by statute, Texas was prohibited from redistricting "mid-decade"; they alleged that the State's plan unconstitutionally discriminated on the basis of race; they asserted that it constituted an unconstitutional partisan gerrymander; and they argued that a number of the districts in Plan 1374C diluted minority voting strength in violation of §2 of the Voting Rights Act. J.S., at 57a.

Following extensive discovery, two weeks of trial, and dozens of witnesses, the three-judge federal court affirmed the legality of the plan in all respects. The court carefully weighed the evidence, assessed the credibility of the witnesses, sifted through the facts concerning each contested congressional district, and issued a thorough opinion affirming the legality of Plan 1374C. J.S., at 57a-200a.

Addressing the plaintiffs' "mid-decade" arguments first, the court noted a wealth of judicial authority "implicitly reject[ing] the notion that a state may impose only one redistricting map each decade." J.S., at 64a. Finding "no provision in either the U.S. Constitution, federal law, or state law that proscribes mid-decade redistricting," J.S., at 81a, the court concluded that Plan 1374C could not be invalidated on "mid-decade" grounds, "particularly where, as here, the State's action follows a court-imposed map," J.S., at 67a.

The court next unanimously rejected the allegation that the State's plan was an unconstitutional racial gerrymander, concluding that "Plaintiffs have failed to prove purposeful racial discrimination." J.S., at 81a. The court credited testimony describing the "political give-and-take by legislative members" driving the State's plan, and concluded that "politics, not race, drove Plan 1374C." J.S., at 88a.

Noting that "[t]he question remains how much of a role the judiciary ought to play in policing the political give-and-take of redistricting," the three-judge court likewise had "no hesitation in concluding that, under current law, this court cannot strike down Plan 1374C on the basis that is an

illegal partisan gerrymander." J.S., at 91a. Despite Appellants' assertions that the State's "sole" intent in the redistricting process was "partisan gain," *see, e.g.*, Jackson Br., at 12, the district court found other important legislative purposes were present. *See* J.S., at 85a-89a.

Turning finally to the allegations of vote dilution under §2, the court spent the bulk of its lengthy opinion detailing the evidentiary and testimonial support for its ultimate conclusion that the State's plan did not, as a matter of fact, dilute minority voting strength in Texas. J.S., at 58a, 93a-170a. Of particular relevance to this appeal, the district court rejected the claim that changes made in the State's map to old CD 24[46] diluted African-American voting strength – the court found that the plaintiffs had failed to demonstrate cohesion among old CD 24's 21.4% African-American voting-age population, J.S., at 112a; that the lack of cohesion among the old district's African-American and Hispanic populations in primary elections was beyond dispute, J.S., at 111a; and that to the extent African-Americans had "opportunity" in old CD 24, it was *dependent* upon "Anglos who vote with them in the general election for Democrats," J.S., at 111a. The court credited testimony that old CD 24 had been drawn by an Anglo Democrat, and for an Anglo Democrat, and noted that the same Anglo Democrat "had not had a primary opponent since his incumbency began." J.S., at 111a. On that record, the court expressly found "that Anglo Democrats control this district is the most rational conclusion." J.S., at 111a-112a. The panel thus concluded that old CD 24 was not a district protected by §2. J.S., at 113a.

The district court also rejected the allegations that the State's plan diluted Hispanic voting strength in South and West Texas. The district court heard evidence about old CD 23's performance under the prior court-drawn plan, under the State's plan, and under the demonstration plan.

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[46] In this brief, "old CD" refers to a congressional district in Plan 1151C used in the 2002 elections, while "new CD" refers to a congressional district in Plan 1374C used in the 2004 elections.

The court concluded that, under the 2001 plan, old CD 23 "was not an effective minority opportunity district." J.S., at 131a. It "had a bare majority of Hispanic citizen voting age population" but was not electing the Hispanic candidate of choice, instead electing an Hispanic Republican, Henry Bonilla. J.S., at 119a. The court also considered new CD 23 under the State's plan, concluding that – just as under the court-drawn plan – it is not an Hispanic-opportunity district. J.S., at 134a. As it was still located in South and West Texas, new CD 23 retained a majority Hispanic total population and voting-age population. But it no longer had its former nominal majority of Hispanic citizen voting-age population. J.S., at 119a.

The changes in CD 23 were produced through the political process of redistricting. As the three-judge court found, "the Legislature sought to apply to South and West Texas its primary partisan goal" while avoiding violations of the law. J.S., at 119a. The court explained how the political goal of aiding the incumbent Representative for CD 23, Congressman Bonilla, interacted with the demographics of the region. "The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in District 23 to shore up Bonilla's base and assist in his reelection." J.S., at 119a. To increase that base, the district was expanded north to take in roughly 100,000 people who largely voted Republican. J.S., at 119a. To equalize population, the lines were contracted along the southern end by moving the boundary within Webb County, removing approximately 100,000 people (many of whom were Hispanic) who largely voted Democratic. J.S., at 119a-20a.

The district court heard evidence about the split in Webb County, including evidence about why the State had chosen to split the county and how it had drawn the particular district lines, principally along Interstate 35. "The State presented undisputed evidence that the Legislature changed the lines of CD 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede

that there is a strong correlation between Latino and Democratic voters." J.S., at 156a.

On the basis of this testimony, the district court found that "the State provided credible race-neutral explanations for Plan 1374C's county cuts. . . . The legislative motivation for the division of Webb County . . . was political." J.S., at 158a. The district court found that the line drawn through Webb County "in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance." J.S., at 159a. The district court ultimately found that there was "credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S., at 160a-61a.

And with respect to CD 25, which Appellants describe with invective – "absurdly misshapen," "absurdly noncompact," "far-flung," and "bizarre," Jackson Br., at i, 3, 16, 43 – the district court found that the elongated shape of new CD 25, like that of new CD 15 and new CD 28, is the direct result of unique Texas geography. *See* J.S., at 154a ("Texas geography and population dispersion limit the availability of district compactness in the southern and western regions of the state."); J.S., at 164a ("Plaintiffs' evidence has not demonstrated that the linking of disparate border and Central Texas Hispanic communities was caused by the factor of ethnicity, rather than the factors of geography and population distribution."). After hearing evidence concerning the line-drawers' intent and assessing credibility, the panel made the factual finding that politics, not race, predominated in new District 25. J.S., at 162a-65a.

Five plaintiff groups appealed *Session v. Perry* to this Court, which, in turn, vacated the district court's judgment and remanded the case for further consideration in light of the Court's intervening partisan-gerrymandering decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

2. *Henderson v. Perry*

On remand, the district court reconsidered the plaintiffs' partisan-gerrymandering claims in light of *Vieth*'s holding that such claims could not be adjudicated without a consensus-garnering metric by which to judge the political fairness of the challenged map. The court had no difficulty concluding that the "claims of excessive partisanship before us [still] suffer from a lack of any measure of substantive fairness." J.S., at 1a. The court noted that none of the plaintiffs could state "with clarity the precise constitutional deficit" in the State's map, and that "[a]lthough the lead plaintiffs invoke the structure of equal protection analysis, they identify no suspect criterion or impinged fundamental interest." J.A., at 1a-2a.

Without any substantive metric by which to measure the political fairness of the State's map, the district court compared it to the map the Court had sustained against partisan-gerrymandering challenge in *Vieth*. It concluded that the "Texas plan is not more partisan in motivation or result, including the impact on the number of competitive districts, than the Pennsylvania plan upheld in *Vieth*." J.S., at 31a. Because no plaintiff had successfully "identified a way to invalidate the Texas plan under the standards they urge as surviving *Vieth*," the court found that the State's plan could not be struck down as a partisan gerrymander. J.S., at 1a.[47] The district court reaffirmed in all respects its prior decision in *Session*, and rendered judgment in favor of the State on all claims. J.S., at 56a.

Following the judgment on remand, eight direct appeals were filed. The Court noted probable jurisdiction over four, and consolidated them for argument.

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[47] On remand, the court considered plaintiffs' assertion that the State should not be permitted to rely on the 2000 census population data to construct its plan in 2003. The district court correctly rejected this argument as a thinly-veiled attempt to "limit[] mid-decade 'voluntary' redistricting in order to limit political gerrymandering." J.S., at 37a.

SUMMARY OF THE ARGUMENT

This case is fundamentally about democracy. For the first time in twelve years, the elected Legislature of the State of Texas succeeded in carrying out its constitutional duty to pass a congressional redistricting plan. That plan, in turn, reflected the consistent, demonstrated preferences of the voters in Texas by allowing a substantial majority of voters (nearly 60%) to elect a commensurate majority of the congressional delegation.

Appellants ask the Court to set aside that legislatively adopted plan, and to instead order a return to a plan perpetuating one of the "shrewdest" partisan gerrymanders of its time. The plan they champion had, for a full decade, frustrated the will of Texas voters by giving Democrats consistent control of the congressional delegation despite their never mustering a majority of the votes. Indeed, from 1996 to 2002, Democrats never garnered more than 44 percent of the statewide vote, and yet they retained a decided advantage in the congressional delegation.

Three overarching principles resolve this case. *First*, claims of partisan gerrymandering necessarily turn on substance, not mere timing. Appellants disavow any challenge to the substantive fairness of Plan 1374C – because no coherent standard of fairness could deem that plan less fair than its predecessor plan – and instead attack only the timing of the plan's enactment. That disavowal is fatal to their claim.

Second, the Constitution and decades of the Court's precedents assign primacy in redistricting to elected state legislatures, not the courts. Appellants' mid-decade and derivative one-person one-vote arguments invert the constitutional structure, elevating courts to the role of primary policymakers in redistricting. Their proffered test – that once a court has enacted a "legal" map, the elected legislature is forbidden from making any changes to that judicial creation – would work a dramatic alteration in the allocation of authority between the courts and

the political branches and would require overruling four decades of this Court's precedents.

Third, the Voting Rights Act protects race, not party. In 2003, the Texas Legislature choose to create two additional minority-opportunity districts: a new African-American opportunity district (new CD 9) and a new Hispanic-opportunity district (new CD 25). In so doing, the Legislature eliminated the 1991 gerrymandered lines protecting a number of rural Anglo Democrats. As a result, Appellants charge, the new map violated the Voting Rights Act. But the Act protects minority voting rights, not the ensured election of one particular political party. And, under the Voting Rights Act, the map *expanded* minority opportunity, while at the same time restoring democratic accountability to the Texas congressional map.

The three-judge district court conducted a full trial, heard extensive testimony, and made detailed fact findings on each of Appellants' claims. The district court correctly concluded that Appellants' partisan gerrymandering claims, "mid-decade" redistricting claims, and one-person, one-vote claims (which were merely disguised "mid-decade" claims) were without foundation in law, and contrary to this Court's precedents. The district court likewise concluded that, as a factual matter, Appellants had failed to prove their Voting Rights Act claims and their racial gerrymandering claims. Those factual findings were not clearly erroneous and, indeed, were abundantly supported by the record. Accordingly, the Court should affirm the judgment of the district court in its entirety.

ARGUMENT

Despite the multiplicity of questions presented in these consolidated appeals, at base Appellants raise just five broad categories of claims:

First, several Appellants argue that the 2003 Texas redistricting constituted an unconstitutional partisan gerrymander under *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

Second, several Appellants contend that what they term "mid-decade" redistricting is constitutionally impermissible, either in conjunction with the alleged partisan gerrymander or as a derivative consequence of the Court's one-person one-vote standards.

Third, several Appellants argue that the alteration of specific districts, namely old CD 24 and CD 23, ran afoul of the Voting Rights Act.

Fourth, the Jackson Appellants contend that the creation of new CD 25 constituted an unconstitutional racial gerrymander.

And *fifth*, the GI Forum Appellants argue that the State of Texas was obligated under the Voting Rights Act to create one additional Hispanic-opportunity district.

Each of these claims was tried before a three-judge federal district court, and each was squarely rejected. None withstands careful scrutiny.

I. THE 2003 TEXAS REDISTRICTING WAS NOT AN UNCONSTITUTIONAL PARTISAN GERRYMANDER.

The Court first opened the door, albeit just slightly, to partisan gerrymandering claims in *Davis v. Bandemer*, 478 U.S. 109 (1986). In that opinion, the Court concluded that such claims could in theory be justiciable, but that to prevail plaintiffs had to demonstrate both discriminatory "intent[]" and an "actual discriminatory effect." *Id.*, at 127. The first prong has never been much of a barrier: "As long as redistricting is done by a legislature," the *Bandemer* Court observed, intent is "not very difficult to prove." *Id.*, at 128.

The second prong, however, proved far more formidable. As the Court explained,

> "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. . . . [A] finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.*, at 132-33.

The inquiry was one of *process*, not specific election outcomes;[48] as long as members of the plaintiff party were not prohibited from participating in the process, and so theoretically affecting the outcome, there was no discriminatory effect. As the Western District of Texas explained – in rejecting a political gerrymandering claim brought by Republicans to the 1991 Texas map – to prevail, a political party must show that it "cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures." *Terrazas II*, 821 F.Supp. at 1174. Such systematic exclusion from the political process rarely happens, and so, in the decades after *Bandemer*, no court ever found an actual discriminatory effect. J.S., at 8a & n.16.[49]

Appellants attempted to meet the *Bandemer* standard, and, based on the evidence presented, the three-judge court unanimously rejected that claim. J.S., at 91a

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[48] As *Bandemer* explained, merely losing elections is not enough because "[a]n individual . . . who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as the other voters in the district." 478 U.S., at 131-32.

[49] As the three-judge court expressly found:

> "*In Texas, redistricting advantages can be overcome through the political process.* The exchange of political advantage between the Democrats in 1990 and the Republicans in 2000 demonstrates that reality. If the Democratic party takes the main statewide offices, Democrats can block a state legislative redistricting plan and write their own through the Legislative Redistricting Board. The resulting State Legislature could then redraw the congressional lines." J.S., at 92a (emphasis added).

("We have no hesitation in concluding that, under current law, this court cannot strike down Plan 1374C on the basis that it is an illegal partisan gerrymander."); *see also* J.S., at 172a (Ward, J., concurring in part and dissenting in part).

The test by which Appellants hoped to meet *Bandemer* was precisely identical to the test advocated in *Vieth*: (1) "predominant intent to achieve unfair partisan advantage" and (2) "the effect of so skewing electoral outcomes that Democrats would have no chance of winning a majority of seats . . . even if they repeatedly won a narrow majority of the votes statewide." *See* Jackson Tr. Br., at 34 (Dec. 3, 2003) (citing *Bandemer*, 478 U.S. 109).

The overlap with *Vieth* was not by accident. Indeed, lead counsel for the Jackson Appellants returned from presenting oral argument in *Vieth* on December 10, 2003, and advanced the very same theory on December 11, the opening day of trial in Texas. And Appellants' principal expert witness, Allan Lichtman,[50] was the very same expert that lead counsel relied upon in *Vieth* to support their theory of partisan effect.[51] Thus, Appellants candidly acknowledged, their theory "*match[ed]* the one . . . proposed to the Supreme Court in *Vieth*." Jackson Tr. Br., at 34 (Dec. 3, 2003) (emphasis added).

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[50] In the Texas case, the Jackson Plaintiffs relied on Lichtman to analyze the voting rights issues and John Alford to analyze partisan gerrymandering; Alford, in turn, utilized the identical methodology as had Lichtman in *Vieth*. *See, e.g.*, Appellants' Reply Br., at 9-12, *Vieth v. Jubelirer* (No. 02-1580).

[51] At trial, the centerpiece of Appellants' theory was a model of "fairness" built on a statistical model of statewide proportionality – a prediction of how many individual congressional seats should be won by a party that receives a particular share of the statewide vote. *See* Jackson Tr. Br., at 34 (Dec. 3, 2003). In particular, the Jackson Plaintiffs argued for what they called "majoritarianism," *i.e.*, that a violation of the Constitution could be shown if, in a hypothetical future election in which Democrats were to win a majority of the votes statewide, they would likely not be able to translate that majority of votes into a majority of the State's delegation in the House of Representatives. *See* Jackson Post-Tr. Br., at 68-69 (Dec. 20, 2003).

Vieth, of course, categorically rejected the proportionality-based statewide models offered by Plaintiffs. *See Vieth*, 541 U.S., at 288 (plurality opinion) ("[T]he Constitution contains no such principle."); *id.*, at 308 (Kennedy, J., concurring) ("The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept."); *see also id.*, at 318 (Stevens, J., dissenting) ("Plaintiff-appellants urge us to craft new rules that in effect would authorize judicial review of statewide election results to protect the democratic process from a transient majority's abuse of its power to define voting districts. I agree with the Court's refusal to undertake that ambitious project."); *id.*, at 346-47 (Souter, J., dissenting) (rejecting statewide claims as judicially unworkable until experience is gained with district-level claims).[52]

Given the substantial identity between the theory plaintiffs advanced at trial and the theory rejected in *Vieth*, the district court had little difficulty rejecting Appellants' partisan gerrymandering claims – again unanimously – on remand following the decision in *Vieth*. J.S., at 1a-2a; *id.*, at 45a (Ward, J., specially concurring).

Having failed to persuade the district court, Appellants have chosen on appeal to advance two additional, different versions of their theory, neither of which meets the challenge of *Vieth*.

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[52] The only Justice who even entertained the *Vieth* plaintiffs' statewide theory was Justice Breyer, who limited his concern to a situation where an actual political majority was being thwarted by a political minority. *See id.*, at 360-61 (Breyer, J., dissenting). That concern is not present here. The other three dissenting Justices wrote that, although they believed political-gerrymandering claims to be justiciable, they would confine them to district-specific claims rather than statewide models of proportional representation such as offered by Appellants. *See Vieth*, 541 U.S., at 327-28, 339 (Stevens, J., dissenting); *id.*, at 346 (Souter, J., dissenting).

A. The Court's Decision In *Vieth*.

In 2004, the Court again took up the question of partisan gerrymandering. A majority of the Court held that the *Vieth* appellants' theories – and those of the various *amici* and those proposed by the dissenting Justices – were inadequate to state a claim. The four-Justice plurality would have held that all political-gerrymandering claims are nonjusticiable. *Vieth*, 541 U.S., at 281 (plurality opinion). Justice Kennedy concurred in the judgment, agreeing that none of the gerrymandering theories that had yet been offered to the Court could form the basis of a viable claim. *Id.*, at 308, 317 (Kennedy, J., concurring).

The four-Justice plurality and Justice Kennedy's concurrence did not disagree about the futility of the claims before the Court. Justice Kennedy expressly agreed with the plurality's rejection of the potential political-gerrymandering tests that had been proposed to, or suggested by, Members of the Court. He rejected the plaintiffs' proposed principle that "a majority of voters . . . should be able to elect a majority of the . . . congressional delegation," and affirmed the plurality's rejection of "the other standards that have been considered to date." *Id.*, at 308 (Kennedy, J., concurring). He also rejected the *Bandemer* standard and those standards offered by the dissenting Justices. *See id.* (Kennedy, J., concurring) (the plurality opinion "demonstrat[es] that the standards proposed in [*Bandemer*], by the parties before us, and by our dissenting colleagues are either unmanageable or inconsistent with precedent, or both").

Thus, a majority held that the *Vieth* plaintiffs' complaint was properly disposed of at the pleading stage, *id.*, at 306 – that there was no need to provide an opportunity for the plaintiffs to replead because there was no viable claim available for them to plead. As Justice Kennedy observed, "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational

rights." *Id.*, at 307-08. Without such standards, court intervention is inappropriate. *Id.*, at 307.

B. Appellants' "Sole Intent" Argument Does Not State A Claim Of Partisan Gerrymandering Under *Vieth*.

Faced with the mandate from Justice Kennedy for future litigants to work over time to develop a consensus on "substantive principles of fairness" whereby to measure partisan effect, Appellants have chosen simply to give up on the task. Because the second prong of *Bandemer* (effects) was too difficult to meet, and because developing judicially manageable standards is at least currently not feasible, Appellants instead propose abandoning the inquiry altogether. Thus, Appellants urge the Court to renounce any inquiry into effect, and to rely instead solely on the first prong of *Bandemer*: partisan intent.

Appellants frame this alteration as an advantage – freed from the burden of having to prove discriminatory effect, they suggest their claim is straightforward:

> "Appellants' current claim alleviates the justiciability concerns expressed in *Vieth*, because it *does not ask a court to determine how much bias is too much*." Jackson Br., at 17 (emphasis added).

Of course, a "substantive principle of fairness" to determine "how much bias is too much" is precisely what Justice Kennedy said was needed, and it is what Appellants have chosen to make no attempt to provide.

Instead, Appellants propose two alternatives: first, that a redistricting map undertaken for "solely" partisan purposes (*i.e.*, that really, really meets *Bandemer* prong one), is by virtue of that unconstitutional; and second, that a redistricting may be presumed to be "solely" partisan, when undertaken mid-decade. The second argument – Appellants' mid-decade/partisan gerrymandering hybrid – will be addressed in Part II, *infra*. But the first argument – that "sole" partisan purpose is enough – was squarely rejected by *Vieth*.

Appellants urge that "the opinions in *Vieth* strongly support the conclusion that a redistricting plan undertaken solely to achieve partisan advantage, and serving no other

purpose, necessarily violates the Constitution." Jackson Br., at 17. Under this theory, *Vieth* apparently made it easier to bring political gerrymandering claims by eliminating the "effects" prong of *Bandemer* and clearing the way for claims based only on a sufficient showing under the "intent" prong. No fair reading of *Vieth* yields such a conclusion.

1. *Vieth* rejected the notion that allegations of "sole," "predominant," or "only" partisan intent suffice to state a claim.

At trial in this case, the Jackson Appellants argued for a "predominant intent" standard by which a court would evaluate whether partisan motives were excessive where the Legislature "sacrificed other neutral and legitimate criteria to that overriding [political] goal." *See* Jackson Tr. Br., at 34 (Dec. 3, 2003); Jackson Post-Tr. Br., at 67 (Dec. 22, 2003). That argument mirrored the allegations in *Vieth*, which the Court rejected as insufficient. In *Vieth*, one plaintiff "allege[d] that the new districting plan was created '*solely*' to effectuate the interests of Republicans, and that the General Assembly relied '*exclusively*' on a principle of 'maximum partisan advantage' when drawing the plan." 541 U.S., at 318-19 (Stevens, J., dissenting) (emphases added). And, given the procedural posture of *Vieth* – in which the Court was reviewing the grant of a motion to dismiss – those allegations were presumed to have been true. *See, e.g.*, *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (noting that the allegations of a complaint are taken as true for purposes of a motion to dismiss).

As the three-judge district court noted, Justice Stevens *in dissent* argued for the very same test as do the Jackson Appellants, focusing precisely on whether a particular "map was drawn 'solely' and 'exclusively' for political ends," J.S., at 16a (citing *Vieth*, 541 U.S., at 317-19 (Stevens, J., dissenting)). Appellants did not hide from that fact; indeed, they affirmatively cited Justice Stevens' dissent as authority for their proposed "sole" purpose test. *See* Jackson Br. on Remand, at 10 (docket #200) (citing *Vieth*, 541 U.S., at 339 (Stevens, J., dissenting)). Thus, the three-judge court concluded,

> "[w]e are persuaded that the Jackson Plaintiffs offer a standard for measuring an excessively partisan redistricting plan that is *functionally equivalent to the standard offered in Justice Stevens's dissent.*" J.S., at 16a (emphasis added).

A majority in *Vieth* explicitly rejected the standard proposed by Justice Stevens (and urged today by Appellants). *See Vieth*, 541 U.S., at 292-94 (plurality opinion); *id.*, at 308 (Kennedy, J., concurring) (concluding that the plurality opinion "demonstrat[es] that the standards proposed in [*Bandemer*], by the parties before us, and *by our dissenting colleagues* are either unmanageable or inconsistent with precedent, or both" (emphasis added)).

Instead, the Court acknowledged that political concerns are an inevitable part of any legislative process, especially one with the real-world political consequences of redistricting. *Id.*, at 286 (plurality opinion). And the Court made plain that intent alone cannot be sufficient – even an allegation of intent preceded by intensifiers like "sole," "only," or "predominant." *See id.*, at 285 (plurality opinion) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide."); *id.*, at 306-07 (Kennedy, J., concurring); *see also Bandemer*, 478 U.S., at 128 ("As long as redistricting is done by a legislature," partisan intent is "not . . . very difficult to prove.").

That result should control here, where Appellants offer no more than a collection of similar intensifiers in front of the word "partisan." No matter how many times they say "sole," "exclusive," or even "really super duper," *Vieth* rejected their proposed standard.

2. Even if proof of "solely" partisan intent could make out a claim, the Texas Legislature made a wide range of additional legitimate policy judgments in the adoption of its map.

Even if Appellants' proposed "solely"-partisan test were the law, on this record the State's map would pass it. In aid of their claim that the map was motivated by "solely"

partisan intent, Appellants rely on two sleights of hand. First, they assert that the State conceded, and the district court found, that the intent was "solely" partisan. And second, they attempt to shift the focus from the traditional focus in gerrymandering claims – namely on the specific lines chosen by map-makers in drawing the map – to the antecedent decision whether to draw the map at all. Neither misdirection is sound.

a. The State did not "concede" and the district court did not "find" that the map was "solely" partisan.

As support for a supposed "admission" that partisan maximization was the "*sole* motivation" of the Legislature, Appellants rely on incomplete snippets of testimony or evidence explaining that "politics" was the primary driver behind the decision to revisit redistricting in 2003 or behind certain lines drawn on the map. *See, e.g.*, Jackson Br., at 12-13; LULAC Br., at 8. What they fail to acknowledge is that the vast majority of these references involved a distinction between politics (as a permissible consideration) and race (an impermissible one). *See, e.g.*, J.S., at 88a ("Plaintiffs' expert testimony supports our conclusion that politics, not race, drove Plan 1374C."). Whatever adverb or adjective was used, the point was clear: the Legislature's purposes were not driven by race.

Although one searches the Jackson Appellants' Statement of the Case in vain for any other mention of the district court's factual findings, four times they cite the court's alleged "finding" of "sole" partisan intent. Jackson Br., at 12, 13, 20 n.18, 27. The court made no such "finding." Of the four references to the court's "finding," only one, on page 12, actually cites the district court opinion. And there, they cite pages 85a and 88a-89a. Tellingly, these pages are *not* from the district court's discussion of partisan gerrymandering; that occurred in a subsequent section of the opinion. Rather, Appellants quote from the district court's rejection of their racial-gerrymandering claim, where, as a counter-point to race, the district court described the countervailing (and dominant) considerations

as "political."[53] That is a far cry from a factual finding that partisan politics was the "sole" consideration in drawing the map.

Indeed, on remand, the district court took direct issue with the Jackson Appellants' "solely" partisan argument:

> "[t]his ignores, as it must, the reality that even with an overarching objective of feathering the party nest, the various cuts and turns of a redistricting plan with its reverberating impacts are infused with a myriad mixtures of local politics and accommodation, inevitably producing lines drawn for a variety of reasons and objectives, often inconsistent with the overall objectives of partisan gains." J.S., at 15a n.38.

b. The Legislature had multiple additional motivations in drawing the map.

That being said, there is no disputing that partisan gain was a significant factor behind at least some individual legislators' commitment to redistricting. "As long as redistricting is done by a legislature," partisan intent is "not . . . very difficult to prove." *Bandemer*, 478 U.S., at 128. Of course, politics mattered, but the Legislature had no singular desideratum.[54]

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[53] Indeed, Appellants' mantra from the district court opinion, concerning the "single-minded purpose of the Texas Legislature" is taken from the sentence immediately following the court's conclusion that "Plaintiffs have not proven their claim of racial discrimination." J.S., at 85a. Under Appellants' proposed standard, apparently, the Constitution places States in an intractable dilemma – beating a *Shaw* claim necessarily sets the State up to lose under *Vieth*.

[54] On rational basis review – to which Appellants concede their partisan-gerrymandering claims are subject, *see* Jackson Br., at 18 n.17 – a legislature need not have articulated *any* reason for enacting a statute, and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Thus, Appellants' repeated assertion that the Texas Legislature had a bad purpose for drawing its map – even if it were true – would not overcome the legislative action's "strong presumption of validity" on rational basis review: Appellants have the

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i. The Legislature's desire to carry out its constitutional duty to redistrict is necessarily a rational purpose for doing so.

On February 11, 2003, at the very outset of the redistricting debate, the Chairman of the House Committee on Redistricting asked the Texas Attorney General for a formal opinion whether the Texas Legislature had a "'mandated responsibility to enact a permanent map for the electoral period 2003 through 2010.'" Op. Tex. Att'y Gen. No. GA-0063 (2003) (quoting Letter from the Hon. Joe Crabb).[55] Turning to the text of the Constitution and carefully surveying this Court's opinions, the Attorney General responded as follows:

> "The United States Supreme Court has reminded parties on many occasions that 'reapportionment is primarily the *duty and responsibility* of the state through its legislature or other body, rather than of a federal court.' *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also, e.g.*, *Branch v. Smith*, 123 S. Ct. 1429, 1444 (2003) ("it certainly remains preferable for the State's legislature to complete its *constitutionally required* redistricting"). . . .
>
> "While the United States Constitution entrusts states with the primary *duty and responsibility* to redraw their congressional districts, U.S. CONST. amend. XIV, §2, and the Texas Constitution vests

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burden "to negate every conceivable basis which might support it." *Id*, at 314-15 (internal quotations omitted).

[55] Texas law permits certain officials, TEX. GOV'T CODE §402.042(b), to request the Attorney General to issue a written opinion "on a question affecting the public interest or concerning the official duties of the requesting person," *id.* §402.042(a). As the Chairman of the House Committee on Redistricting, Representative Crabb was authorized to request an opinion on behalf of the Committee. *See id.* §402.042(b)(7). The legal process for issuing formal Attorney General opinions in Texas bears many similarities to the federal process for the issuance of U.S. Attorney General opinions from the Office of Legal Counsel. *See* 28 U.S.C. §§510-13; Office of Legal Counsel, 28 C.F.R. §0.25(a) (2005).

> redistricting authority in the Texas Legislature, *see* TEX. CONST. art. III, §§1, 28, there exists no mechanism for enforcing this duty. *See generally* Tex. Att'y Gen. Op. No. O-6488 (1945), Tex. Att'y Gen. Op. (To Hon. H.B. Hill, July 21, 1921), 1920-1922 TEX. ATT'Y GEN. BIENNIAL REP. 188 (constitutional provisions requiring legislature to redistrict Texas House and Senate are mandatory in form, but impose no penalty for nonperformance nor provide any other enforcement mechanism). . . .
>
> "Consequently, while courts are empowered to resolve congressional redistricting controversies if the legislature fails to fulfill its duty, courts cannot mandate that the legislature summon political will or muster consensus. There is no judicial remedy to counter legislative noncompliance." Op. Tex. Att'y Gen. No. GA-0063 (2003) (emphases added).

Given that (1) the text of the Constitution, (2) numerous decisions from this Court, and (3) the express legal advice of the State's Attorney General all pointed to a legal "duty and responsibility" (albeit not judicially enforceable) for the Legislature to engage in redistricting, and given that the Legislature had not fulfilled this duty in twelve years, it is – to say the least – a rational basis for the Legislature to have chosen to carry out what it understood to be its constitutional responsibility.[56]

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[56] Given Appellants' repeated emphasis on the notions of "necessary" and "unnecessary" redistricting (defined as redistricting required or not required by threat of judicial order), Appellants would presumably take issue with the Attorney General's legal advice that the Legislature had a live "duty and responsibility" to redistrict, even though no court could force it to do so. For purposes of this argument, however, it makes little difference whether the Attorney General's legal advice was correct (as he believes it was) or incorrect (as Appellants would surely urge); in either case, it is undisputed that he *in fact gave that specific legal advice to the Legislature*, and so it is surely a rational

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ii. Eliminating what many legislators perceived to be a preexisting partisan gerrymander provided an additional rational basis for the State's map.

The Texas Legislature had an additional, entirely rational reason to decide to redraw the court-drawn map: that map produced antimajoritarian electoral results. Those results provided ample basis to conclude that the preexisting plan was a vestige of a Democratic gerrymander that maintained a Democratic congressional majority despite a consistent majority of congressional votes cast for Republicans statewide. Unsurprisingly, that is just what the district court found. J.S., at 12a-13a, 21a. And there is no dispute that many Texas legislators perceived the prior map to be exactly that: the dead-hand effect of the 1991 Democratic gerrymander. The record is replete with testimony that the Legislature strongly desired "to make the congressional delegation more reflective of state voting trends," J.S., at 88a, and to correct that perceived past gerrymander. That purpose – unraveling a perceived preexisting political gerrymander – is an entirely legitimate, even laudable, legislative purpose.

Curiously, the Jackson Appellants suggest that an intention to make an antimajoritarian map into a majoritarian one is irrational and constitutionally illegitimate. *See* Jackson Br., at 15, 27. This argument is particularly surprising in light of the fact that in *Vieth*, the same counsel urged the Court to adopt a reading of the Constitution that could *require* making antimajoritarian maps majoritarian. *See* Appellants' Br., at 32-41, *Vieth v. Jubelirer* (No. 02-1580) (articulating the proposed "majoritarian" standard). However one resolves the apparent tension, it strains credulity to maintain that desiring to

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basis for the Legislature to follow the good-faith legal advice given by the state officer constitutionally charged with rendering such advice.

remedy a longstanding antimajoritarian map is, in and of itself, irrational.[57]

iii. The district court found as a factual matter that, in drawing the map, the Legislature had a host of nonpartisan purposes.

Both of the preceding purposes relate to the decision whether or not to draw the map. But the decision to draw the map is not the most relevant question. Appellants' *Vieth* claims sound in Equal Protection, and Equal Protection claims depend upon the *classifications* being made by government. The decision whether or not to redistrict classified nobody; rather, the lines on the map are the only classifications. Hence, in every political-gerrymandering claim the Court has considered, the focus has been on the *map* itself, not on the decision to create the map in the first place.

And, at that level of granularity, Appellants have not even attempted to put forth an argument that every district line was motivated "solely" by partisan gain. For good reason: on this record, the district court easily found that the State's plan was substantially motivated by factors in the legislative give-and-take entirely distinct from partisan politics. Although the then-governing law did not require the district court to search for such reasons, it found and described many of them in its initial pre-*Vieth* decision. *See, e.g.*, J.S., at 86a (witness "credibly testified as to the various political considerations that combined to result in the lines of current . . . District 26"); J.S., at 86a n.61 (State Representative "would not support any plan" if it split the City of Arlington); J.S., at 87a ("Representative Lewis wanted his district to fall completely within one congressional district."); J.S. App., at 87a ("Representative Phil King . . . wanted Parker and

[57] As the district court noted in response to Appellants' argument that legislatures may not consider political fairness in deciding to redistrict, "saying it is irrational, even saying it many times, does not make it so." J.S., at 25a-26a.

Wise Counties to be included completely in Congresswoman Granger's District 12."); J.S., at 88a n.65 ("'[W]e tried to . . . maintain the city limit lines for Ft. Worth and for Arlington. . . . And generally, you had that level of politics going on in every county. . . .'" (quoting testimony of Representative King)); J.S., at 159a (noting that the decision to locate part of Hays County in District 28 "resulted from the Legislature's desire to keep Texas State University . . . out of District 21, which contains the University of Texas at Austin").[58]

And this give-and-take was not simply between and among Republicans; a significant number of requests made by Democrats were honored in the drawing of Plan 1374C. African-American Democratic Representative Glenn Lewis requested that his Texas House District be kept whole, and the leadership in the Texas House committed to honoring that request. *See* Tr. 12/18/03 AM, at 78:1-9 (Bob Davis); J.A., at 282. Thus legislative district 95 was placed in Congressional District 26. *See* Tr. 12/18/03 AM, at 76:23-77:4 (Bob Davis). At the request of Hispanic Democratic Senator Hinojosa, the cities of Mission and Edinburg were kept whole. *See* Tr. 12/18/03 AM, at 89:2-16 (Bob Davis). Likewise, the southern Dallas suburbs of DeSoto and Lancaster were added into District 30, Congresswoman Eddie Bernice Johnson's district. *See* Tr. 12/18/03 AM, at 120:8-14 (Bob Davis). And African-American Democratic Representative Ron Wilson's legislative district was kept whole and placed in Congressional District 9, the new Houston-area African-American opportunity district. *See* Tr. 12/18/03 PM, at 68:10-12 (Rep. Wilson).

Such local and community interests suffused the drawing of the map. They are the essence of the legislative

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[58] These detailed references in the district court's initial opinion also belie Appellants' startling suggestion that, on remand, the district court "contradict[ed its] own prior description of the 2001 court-drawn plan." Jackson Br., at 13. To the contrary, the court well understood its own findings, and it is Appellants who attempt to stretch the court's initial findings beyond what they will bear. *See, e.g.*, J.S., at 15a n.38.

process, and they are more than sufficient to refute Appellants' counter-factual assertion that partisan gain was the only purpose of the Legislature.[59]

C. Under Any Metric, Plan 1374C Is Substantively More Fair Than Its Predecessor Plan.

In *Vieth*, the Court held that until plaintiffs can demonstrate the emergence of a "substantive definition of fairness" that "command[s] general assent," neither this Court nor any other court will be able to determine whether the use of political classifications in a districting plan has had an impermissible effect on a political group's representational rights. 541 U.S., 306-07 (Kennedy, J., concurring).[60] That is, until courts have "available a manageable standard by which to measure the *effect* of the apportionment," partisan-gerrymandering claims cannot be adjudicated. *Id.*, at 315 (emphasis added). This is true even if – as in *Vieth* – the Court must assume that the new district lines were drawn with a "solely" partisan intent. *See id.*, at 273 (plurality opinion).

Given the Court's explicit charge, Appellants' failure to offer any substantive metric by which to measure the challenged map's effect on their representational rights entirely forecloses any claim, whether based on equal protection principles or the First Amendment, that the map has impermissibly burdened those rights. *See id.*, at 314-15 (Kennedy,

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[59] And, at the end of the day, that two Democrats – African-American Representative Wilson and Hispanic Representative Vilma Luna – both voted *for* the State's plan, which would be incomprehensible if, as Appellants suggest, the State's plan was "inexplicable by anything but animus toward" Democrats. *See* Jackson Br., at 20.

[60] Because Justice Kennedy concurred in the judgment in *Vieth* on grounds more narrow than the plurality, those grounds were properly applied by the district court as the Court's holding. *See Marks v. United States*, 430 U.S. 188, 194 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotations omitted).

J., concurring); J.S., at 1a. On the need for such a standard, both the plurality and Justice Kennedy agreed.

The divergence between Justice Kennedy and the plurality was one of temperament, not reasoning. While the plurality would hold that political-gerrymandering claims are inherently nonjusticiable, Justice Kennedy preferred to "err on the side of caution" by allowing for the possibility of federal court intervention at some future time should a consensus eventually emerge on "suitable standards with which to measure the burden a gerrymander imposes on representational rights." *Id.*, at 313 (Kennedy, J., concurring). There may come a time when the Court will need to revisit its holding in *Vieth* – after substantive measures of political fairness have developed in the lower courts, or after the passage of time has demonstrated that no such standards are forthcoming. *See id.*, at 311 (Kennedy, J., concurring) (noting that a manageable standard might "emerge in the future"). That time is not now; the ink is barely dry on *Vieth*, and no such consensus can be said to have emerged.

1. Appellants failed to offer any substantive definition of fairness or show any impermissible political effect.

As the three-judge district court unanimously found, "[w]e conclude that the claims of excessive partisanship before us suffer from a *lack of any measure of substantive fairness.*" J.S., at 1a (emphasis added); *see also id.*, at 26a (noting Appellants' "inability to articulate a measure of substantive fairness"). On appeal, neither the LULAC nor the Travis County Appellants propose any clear standard, manageable or otherwise, by which to determine whether the State's map is unfair. *See generally* LULAC Br., at 15-25; Travis County Br., at 14-30. And the Jackson Appellants affirmatively celebrate their refusal to show that the map has had or will have an impermissible effect. *See* Jackson Br., at 17 (highlighting the fact that they do not challenge "the *effects* of the district lines" (emphasis added)); *id.*, at 22

(asserting that their claim "*does not turn on* analysis of the *exact effects* of the map" (emphasis added)).[61]

Appellants are certainly correct that abandoning the search for a manageable standard to measure impermissible political effects would "alleviate[] the justiciability concerns expressed in *Vieth*" by relieving the Court of the difficult task "of identifying maps that 'go too far.'" Jackson Br., at 17, 22. But their argument that a partisan-gerrymandering claim can be made out on a showing of intent alone is not an argument under *Vieth* – it is an argument to ignore *Vieth*, as well as *Bandemer* before it. *See, e.g., Bandemer*, 478 U.S., at 139 (plurality opinion) ("[E]ven if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, . . . there has [not] been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.").

Appellants' lead counsel was unequivocal – and unquestionably correct – when he told the Court considering the *Vieth* appeal that "[b]y themselves, bad intent and bizarre district shapes can *never* make out a valid claim of partisan gerrymandering." Appellants' Br., at 34, *Vieth v. Jubelirer* (No. 02-1580) (emphasis added).

The reason Appellants appear reluctant to acknowledge their burden to prove that the State's map has a politically unfair *effect* is likely related to the quite impossible task they face in this case of proposing "an agreed upon model of fair and effective representation," *see Vieth*, 541 U.S., at 307 (Kennedy, J., concurring), that would mark the court-drawn, *antimajoritarian* plan – the one they prefer – as more "fair

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[61] The briefs of Frenchie Henderson and Charles Soechting, filed in support of Appellants, also straightforwardly concede that they make no attempt to propose a substantive fairness measure. *See* Henderson Br., at 2 (noting that the "arguments here, as below, avoid the 'how much is too much' partisanship problem"); Soechting Br., at 12-13 (conceding Appellants' lack of a substantial definition of fairness as "undeniably true," but encouraging the Court to avoid the "temptation" of trying to measure partisan-gerrymandering claims "from [a normative] standard of objective fairness").

and effective" than the *majoritarian*, roughly proportional State-drawn plan they challenge, *see* J.S., at 12a-13a.

Nevertheless, whether a partisan-gerrymandering claim is framed under the Fourteenth or the First Amendment, *Vieth* requires a substantive definition of fairness by which to determine whether the challenged plan has impermissibly burdened Appellants' representational rights.

a. Demonstration of an impermissible effect is necessary to any partisan-gerrymandering claim under the Fourteenth Amendment.

Appellants' argument that a sufficient showing of partisan intent can alone suffice to establish an equal protection violation reflects their assumption that political classifications are inherently invidious. *See, e.g.*, Jackson Br., at 20 (analogizing map taking political affiliation into account with a law "inexplicable by anything but animus toward the class it affects"). But political classifications are not inherently invidious. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); *id.* ("Politics and political considerations are inseparable from districting and apportionment.").

Politics is an inherent part of redistricting – it would be "'quixotic'" to believe otherwise. *Id.*, at 285 (plurality opinion) (quoting Appellants' Br., at 3, *Vieth v. Jubelirer* (No. 02-1580)). The Framers understood full well that by committing redistricting decisions primarily to elected legislatures, political considerations would play a central role. "The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics." *Id.*; *see also id.*, at 307 (Kennedy, J., concurring) ("Race is an impermissible classification. . . . Politics is quite a different matter."); *see Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition. . . ."); *Shaw v. Reno*, 509 U.S. 630,

662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . . .").

As Justice Kennedy explained in his *Vieth* concurrence, because equal-protection analysis "puts its emphasis on the permissibility of an enactment's classifications," it is well-suited to racial-gerrymandering claims, "since classifying by race is almost never permissible." 541 U.S., at 315. That analysis is considerably more complicated in the context of partisan-gerrymandering claims, however, because there "the inquiry is whether a generally permissible classification has been used for an impermissible purpose." *Id.* *That* question "can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens." *Id.* In other words, "[t]he use of purely political considerations in drawing district boundaries" is not an "evil" absent a constitutionally cognizable "harm." *Id.*, at 355 (Breyer, J., dissenting); *see also id.*, at 355 (observing that "pure politics often helps to secure constitutionally important democratic objectives").

Appellants' failure to explain how the State's map has imposed a constitutionally cognizable burden on their representational rights thus precludes any partisan-gerrymandering claim under the Fourteenth Amendment.[62]

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[62] As the district court rightly found, although Appellants "invoke the structure of equal protection analysis, they identify no suspect criterion or . . . fundamental interest" impinged by the State's map. J.S., at 2a. Perhaps the closest Appellants come to alleging a felt burden on representational rights is their somewhat vague claim that the State's plan prevented split-ticket Republican-leaning voters in six districts "from continuing to elect the [Democratic] incumbents they prefer." Jackson Br., at 15; *see also id.*, at 8. It is not clear whether Appellants believe the "impinged fundamental interest" here belongs to the Republican-leaning majority in these six districts – in which case Appellants presumably have no standing to vindicate that interest – or to the Democratic minority in these six districts – in which case vindicating that "interest" would mean constitutionalizing incumbency protection. In either case, Appellants' focus on split-ticket voters highlights the danger in assuming that equal-protection principles developed in a racial context can be easily imported into a political context. *See Vieth*, 541 U.S., at 287 (plurality opinion)

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b. Demonstration of an impermissible effect is also necessary to any partisan-gerrymandering claim under the First Amendment.

Apparently responding to Justice Kennedy's suggestion in *Vieth* that a partisan-gerrymandering claim might someday be made out under the First Amendment, *see* 541 U.S., at 315, Appellants assert that "the use of government power solely to help or hurt a particular political party's or group's voters, based on the content of their speech or beliefs," violates the First Amendment. Jackson Br., at 20. But framing their partisan-gerrymandering claim as a violation of the First rather than the Fourteenth Amendment does not solve the problem posed by *Vieth* – it would still require a substantive metric by which to determine when the government had impermissibly "help[ed] or hurt a particular political party's" voters.[63]

As Justice Kennedy explained, a hypothetical plaintiff's ability to make out a successful partisan-gerrymandering claim under the First Amendment "depends *first* on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Vieth*, 541 U.S., at 315 (Kennedy, J., concurring) (emphasis added). Because Appellants propose no test by which to measure the political effect of the apportionment

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(noting that "a person's politics is rarely as readily discernible – and *never* as permanently discernable – as a person's race").

[63] It would also, of course, require the Appellants to identify those voters whom the apportionment had unfairly helped or hurt "based on the content of their speech or beliefs." The only voters Appellants identify as having been unfairly impacted by the alleged partisan gerrymander are a number of "heavily Republican" voters who are now "less likely to split their tickets" and vote for Democratic incumbents "based on personal allegiance." Jackson Br., at 8. The allegation that the State's map placed certain voters in districts where they were more likely to vote for candidates based on political philosophy rather than "personal allegiance" hardly seems a firm foundation upon which to construct a novel First Amendment claim.

they challenge, any *Vieth*-based claim that their First Amendment rights were impinged by that apportionment must fail.[64]

c. Appellants did not show that Plan 1374C is less substantively fair than Plan 1151C.

Before the district court, the State defendants observed that, to prevail under *Vieth*, each Plaintiff must be able to answer two questions:

1) " . . . [W]hat is your judicially administrable test for unconstitutional political gerrymandering?

2) How does that test demonstrate that the specific district lines under Plan 1151C are more politically 'fair' than the lines under Plan 1374C?" State Defendants' Response Br. on Remand, at 8.

After extended argument before the district court, and hundreds of pages of briefing before this Court, Appellants still cannot answer either question.

Appellants have good reason to shy from proposing a substantive definition of fairness by which to judge the effects of the map they prefer against the effects of the map they challenge. Notably, in *Vieth*, Appellants' lead counsel did offer a standard: he proposed that a map would be judged impermissibly unfair "only when it prevents a majority of the electorate from electing a majority of representatives." 541

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[64] There is some question as to whether the First Amendment is an appropriate vehicle for partisan-gerrymandering claims at all. As the *Vieth* plurality cautioned, "[o]nly an equal protection claim is before us in the present case – perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in redistricting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." 541 U.S., at 294. This would be problematic, of course, because it has long been taken for granted that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S., at 753.

U.S., at 287 (plurality opinion). Though the Court rightly rejected this "majoritarian" test as little more than a proportional-representation requirement in finer dress, *see id.*, at 288; *id.*, at 308 (Kennedy, J., concurring), it nevertheless acknowledged that the proposed standard reflected "the best that [could] be derived from 18 years of experience," *id.*, at 284 (plurality opinion).

Appellants in the instant case do not offer that test, because under *that* measure, it is Appellants' preferred Plan 1151C that is substantively unfair, not the Legislature's Plan 1374C. As the district court explained, under the plan drawn in 1991,

> "Democrats won twenty-one congressional seats in the 1992 election compared to nine won by the Republicans, even though the 'tipping-point' had been reached with the Democratic and Republican parties capturing an equal share of the vote in statewide races." J.S., at 12a.

And although Republican voting strength continued to grow throughout the 1990's, "with the 1991 Democratic Party gerrymander still in place, Democrats captured seventeen congressional seats to the Republicans' thirteen in the 2000 election, despite Republicans garnering 59% of the vote in statewide elections to the Democrats 40%." J.S., at 12a.

Because the map drawn by the district court in 2001 – the map that Appellants urge this Court to reinstate – by design changed as little of the 1991 map as possible, in the words of the district court: "The map drawn by this court in 2001 *perpetuated much of this gerrymander*." J.S., at 21a (emphasis added); *see also id.*, at 12a-13a ("[T]he plan produced by this court *perpetuated much of the 1991 Democratic Party gerrymander*." (emphasis added)).[65]

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[65] In an attempt to get around this factual finding, Appellants advance the rather odd notion that the three-judge court erred (and presumably, was clearly erroneous) in describing *its own map-drawing methodology*. *See* Jackson Br., at 28. Surely, the district court could accurately recount its own methodology; and, in any event, its finding

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Thus, even though Democrats garnered only 41% of the statewide vote in 2002, they retained a majority of the congressional delegation of seventeen Democrats and fifteen Republicans. J.S., at 42a.

As the district court's chart illustrates, J.S., at 42a, from 1992 to 2002 Democrats never once won a majority of the statewide vote, and yet the extant maps ensured the continued reelection of a Democratic majority in the congressional delegation. Indeed, since 1996, Republicans in Texas have never garnered less than 55% of the statewide vote (and Democrats never more than 44%), and yet the prior maps consistently ensured a Democratic majority.

The differential is all the more noteworthy given the traditional "seat-vote" curve; under standard political science methodology, a party garnering 55% to 59% of the statewide vote (as did Republicans in Texas between 1996 and 2002) would be expected to receive a substantially higher percentage – on the order of 65% to 75% – of the total seats. *See generally* Alan Heslop *Amicus* Br. Despite an expected yield of 65% to 75%, in actual practice Plan 1151C yielded only 47% of the congressional delegation as Republicans – nearly 20 points below what one would expect based on the consistent expressed will of the voters.

The antimajoritarian effect of Plan 1151C was at least comparable to if not significantly worse than that present in the plan challenged in *Vieth*. As the *Vieth* Appellants argued,

> "[i]n the five most recent statewide races combined, Democrats had averaged 50.1% of the major-party vote, and in the most recent congressional elections (in November 2000) they had garnered 50.6% of the major-party votes cast across the State." Appellants' Br., at 43, *Vieth v. Jubelirer* (No. 02-1580).

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that Plan 1151 "perpetuated" the effects of the prior map was demonstrably correct: of the 28 incumbents who ran for reelection in 2002, all 28 were reelected. *See* Election Returns Database, *supra* note 3.

Thus, the *Vieth* Appellants urged that preventing a very slight majority of the statewide vote – 50.1% – from electing a majority of the congressional delegation violated the Constitution. Plan 1151C, in contrast, prevented a much more substantial majority – 57% – from electing a majority of the delegation. Under the argument advanced by lead counsel in *Vieth*, Plan 1151C should fail all the more so.[66]

But, of course, the Court rejected that argument in *Vieth*. Hence, under *Vieth*, even a decidedly antimajoritarian map cannot be struck down as an unconstitutional gerrymander. *A fortiori*, a map that is pro-majoritarian cannot be.

As the district court observed, "the plan passed by the Texas legislature resulted in the election of twenty-one Republicans and eleven Democrats to the House of Representatives in 2004, when the Republican Party carried 58% of the vote in statewide races and the Democratic Party carried 41% of the vote."[67] J.S., at 13a. Thus, while Appellants' preferred plan resulted in an antimajoritarian congressional delegation, the State's plan has generated not only a majoritarian delegation, but also a roughly proportional one.

That is not to suggest that majoritarianism or proportionality are realistic candidates for the consensus-garnering substantive measure of fairness that may someday permit these claims to be adjudicated. But given that they represent "the best that [could] be derived from 18 years of experience," *Vieth*, 541 U.S., at 284 (plurality

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[66] For the same reason, Plan 1151C would presumably fail Justice Breyer's "entrenchment" test, whereas Plan 1374C would easily pass it. *Vieth*, 541 U.S., at 360 (Breyer, J., dissenting) (describing his proposed test that would find unconstitutional "the unjustified use of political factors to entrench a minority in power").

[67] As the district court recognized, these ratios compare favorably with the results in Texas "when the statewide voting strength was roughly reversed in 1982," and the Democrats "took twenty-two congressional seats to the Republicans' five." J.S., at 13a n.35.

opinion), it is significant that it is Appellants' preferred plan, and not the State's, that those tests would condemn.

As Justice White explained in *Gaffney v. Cummings*,

> "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength. . . . [We do not] have a constitutional warrant to invalidate a state plan, otherwise within tolerable limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S., at 754.

Because Appellants offer no substantive principle by which to judge between the political fairness of the maps in question – and there is no coherent metric of fairness that could yield a conclusion that Plan 1151C is more fair than Plan 1374C – the Court should not accede to Appellants' request to order the replacement of the Legislature's map with a map that is demonstrably less fair and less reflective of the will of the voters.

2. *Amici* offer no viable substantive definition of fairness that might help Appellants.

Some of Appellants' *amici* are more forthcoming than Appellants themselves concerning the necessity of finding a fairness measure by which to determine whether a map has an impermissible political effect. *See, e.g.*, Brennan Center for Justice *Amicus* Br., at 22 (stating that, once an impermissible intent has been established, "the question, then, is whether there are judicially manageable standards for gauging the re-redistricting's effect"). Others suggest that the search is doomed from the start. *See, e.g.*, Center for American Progress *Amicus* Br., at 13 ("The notion that there is such a thing as a fairly 'balanced' map that accurately reflects statewide voting patterns is illusory."). But in the hundreds of pages filed by Appellants' *amici*, there is only one even arguably clear proposal

of a candidate for a substantive definition of fairness – the "symmetry standard" – and one other that might possibly be characterized as such – the "competitive district ideal." Neither proposal is of any help to Appellants.

a. The "symmetry standard" is not viable, and in any event is of no aid to Appellants.

Professors King, Grofman, Gelman, and Katz offer an *amicus* brief, in support of neither party, urging the Court to consider adopting the "symmetry standard" as defining partisan fairness. King *Amicus* Br., at 3. As the *amici* describe their measure, it "compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the same given percentage of the vote." *Id.*, at 2-3. Thus, as its name suggests, the symmetry standard is yet another version of a proportionality rule. But instead of comparing the proportion of one party's actual votes to that party's actual seats, it compares the proportion of one party's actual votes and seats to another party's hypothetical votes and seats. Although the symmetry standard is thus subject to the same weaknesses that caused the Court to reject proportionality as the constitutional measure of political fairness, *see Vieth*, 541 U.S., at 288 (plurality opinion); *id.*, at 352 n.7 (Ginsburg, J., dissenting), it lacks the proportionality standard's greatest strengths – clarity and concrete application.

Further, *amici*'s description of the "[t]hree potential approaches" to implementing the symmetry standard confirms that it does not provide a normative measure of fairness, but rather assumes away the question. According to *amici*, the standard can be designed as "(1) a rule that creates as little partisan bias as possible; (2) a rule that prevents a party from gaining a seat to which it otherwise would not be entitled; or (3) a rule prohibiting egregious gerrymanders that show a bias over a certain percentage." King *Amicus* Br., at 3. Those questions, of course, restate the fundamental quandaries that left the Court in *Vieth* searching for a substantive measure of fairness: how much partisan bias is acceptable, to which seats is a party

"entitled," and at what percentage does partisan bias become "egregious"?

Nor does this arbitrary standard – designed to address only the rare if not unprecedented situation of an electorate shifting near instantaneously from a majority (of 58% or more) of one party to a comparable majority of another – account for the heterogeneous distribution of population and political preference. Thus, adopting an overall goal of "symmetry" would require constructing maps that take no real account of other, more traditionally meaningful redistricting values.

b. The "competitive district" standard is not viable, and in any event is of no aid to Appellants.

Another set of professors – Issacharoff, Neuborne, and Pildes – suggests that the central principle at issue in these claims is the "competitive integrity of congressional elections." *See* Issacharoff *Amicus* Br., at 14; *see also* Reform Institute *Amicus* Br., at 19. Although they are careful not to assert that their principle is the substantive definition of fairness missing in *Vieth*, *see* Issacharoff *Amicus* Br., at 14, the professors suggest that partisan gerrymanders can and should be judged by the resulting competitiveness of the districts drawn. These arguments are similar to arguments before the Court in *Vieth*, *see, e.g.*, Reform Institute *Amicus* Br., at 18, *Vieth v. Jubelirer* (No. 02-1580), and are precluded by its holding. *See Vieth*, 541 U.S., at 308 (Kennedy, J., concurring).

As an initial matter, the district court carefully considered Appellants' argument on remand that "the districts under the 2003 Texas plan are non-competitive as a result of partisan gerrymandering." J.S., at 29a-30a. The court flatly rejected that contention: "their argument and evidence assumes, but does not show, a necessary or actual correlation between partisan line drawing and an increase in the number of non-competitive Texas congressional districts," J.S., at 29a-30a. To the contrary, the district court expressly found that the relative competitiveness of districts in Texas had fluctuated little for forty-five years,

see J.S., at 2a, and that the State's plan had "effected little change in the number of competitive districts," J.S., at 31a.[68] To the extent that noncompetitive districts present structural challenges, those challenges cannot be traced to the State's decision in 2003 to replace the court-drawn redistricting map.[69]

More fundamentally, whatever the normative merits of a standard that would require Republicans and Democrats to be distributed relatively evenly into "competitive districts,"[70] such a standard would likely be judicially unmanageable. Consider a hypothetical application of the standard in a State like Texas, where the Republican-Democrat split approaches 60%-40%. If each district were drawn to look like the State as a whole, no district would be competitive. Thus, to create "competitive" districts to satisfy the theoretical model, many Republicans would need to be "packed" into other arbitrarily less competitive districts. Deciding which Republicans to pack, and where, would necessarily involve inherently political calculations

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[68] Indeed, the district court squarely found, "[t]he Texas plan is not more partisan in motivation or result, *including the impact on the number of competitive districts*, than the Pennsylvania plan upheld in *Vieth*." J.S., at 31a (emphasis added).

[69] The professors note that redistricting can have the effect of disrupting entrenched incumbents so as to create more competitive elections. *See* Issacharoff *Amicus* Br., at 17 (distinguishing between elections that follow the mass wave of district changes each decade). That demonstrates, if anything, the real reason that Plan 1374C resulted in such a shift in Texas's congressional delegation. The district court's plan had been drawn to protect incumbent relationships, with special attention to senior members. J.S., at 208a. As a result, all 28 Texas incumbents won in 2002. *See* J.S., at 85; *see also* Election Returns Database, *supra* note 3. But after redistricting in 2003, Texas voters ousted many incumbents in 2004. If the value is in ensuring accountability to the voters, wholesale changes in district lines may be more salve than bane.

[70] *See, e.g.*, *Vieth*, 541 U.S., at 288 n.9 (plurality opinion) (noting that "the Constitution does not answer the question whether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are 'effectively' distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts)").

– should the voters in one region of the State be "packed" so that voters in another area could be blessed with a "competitive" district suitable to the theoreticians? – and the "competitive district" ideal, in itself, would provide no help to a court seeking a well-accepted measure by which to judge or, in the legislature's stead, to *make* those inherently political decisions.

II. APPELLANTS' CHALLENGES TO SO-CALLED "MID-DECADE" REDISTRICTING ARE INCONSISTENT WITH THE TEXT OF THE CONSTITUTION, WITH THE STRUCTURAL ROLES OF LEGISLATURES AND THE JUDICIARY, AND WITH DECADES OF PRECEDENT.

At trial, several plaintiffs advanced a "pure" mid-decade redistricting argument, namely that Article I of the Constitution prohibited redistricting at any time other than after a decennial census. The three-judge court unanimously and categorically rejected that claim. J.S., at 61a ("Plaintiffs ultimately fail to provide any authority – constitutional, statutory, or judicial – demonstrating that mid-decade redistricting is forbidden in Texas."); J.S., at 171a (Ward, J., concurring in part and dissenting in part) ("I join the court's opinion that the law does not preclude the State's Legislature from enacting a mid-decade redistricting plan . . . ."). None of the Appellants in these consolidated appeals advances that claim.

Instead, Appellants advance two new "hybrid" claims. First, Appellants argue that, even if they cannot prove up a claim of partisan gerrymandering, allegations of "sole" partisan intent – in combination with redistricting mid-decade – should suffice collectively to render the map unconstitutional. Second, they argue that even if mid-decade redistricting is not forbidden directly by the Constitution, it is barred implicitly by the derivative application of the Court's one-person one-vote doctrine. Neither argument has merit.

A. This Is *Not* Mid-Decade Redistricting.

At the outset, it bears emphasis that the facts in this case do not present "mid-decade" redistricting, if that term is understood to mean redistricting more than once in a

decade. The last time the Texas Legislature redistricted was 1991. Twelve years and a decennial census ensued, and the Legislature did not again redistrict until 2003. Thus, the policy specter to which Appellants point, of legislatures coming back year-after-year, adjusting the congressional lines over and over again after every election, is simply not presented in this case.

Moreover, there is reason to be skeptical that such an outcome is likely. Appellants have pointed to no nationwide outbreak of serial redistricting. Redistricting inevitably causes political strife and division; because it often devolves into a zero-sum political battle, it is necessarily a painful process for legislatures to undergo. Accordingly, legislatures are typically reluctant to dive back into the waters of redistricting. Before *Reynolds v. Sims*, many States had resisted redistricting for decades in order not to disturb the status quo. 377 U.S. 533, 569-70, 583-84 (1964); *see also id.*, at 588-89 & nn.1-2 (Harlan, J., dissenting). Indeed, were it not for the dramatic imbalance between the current voting trends in Texas and the twelve-year-old gerrymander that ensured Democratic control of the congressional delegation – were it not for the large numbers of congressional seats in the balance because of the preexisting map – it is doubtful that the Texas Legislature would have chosen to undertake this effort.[71]

B. The Constitution Does Not Prohibit A State Legislature From Replacing A Court-Drawn Map. To The Contrary, It Places Primary Districting Responsibility In The State Legislatures.

Even if this case did present an instance of "mid-decade" redistricting, there would be no constitutional prohibition to a legislature's making that policy choice. Although Appellants have now abandoned their pure

[71] Thus, the strongest incentive to redistrict is present precisely when one would in theory find it most desirable to have the map redrawn – when the democratic processes and the consistent will of the people are being systematically frustrated.

challenge to mid-decade redistricting, it is worth surveying briefly why they have done so. Indeed, a full understanding of the clear constitutional authority for state legislatures to act in this arena substantially informs – and undercuts – Appellants' current efforts to eliminate that authority through back-door hybrid theories.

1. The Elections Clause authorizes state legislatures to draw district lines except as Congress might dictate otherwise.

The Constitution assigns responsibility for drawing congressional districts to the political branches of the state and federal governments, with the primary responsibility in state legislatures. The Elections Clause delegates the full measure of that power, subject to congressional regulation:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, §4, cl. 1 (emphasis added).

The Elections Clause thus delegates to States the power to draw congressional district lines. *See Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, §4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). The words used in the Elections Clause – "Times, Places, and Manner of holding Elections" are "comprehensive words embrac[ing] authority to provide a complete code for congressional elections," subject to Congress's power also to enact laws regulating the same subject matter. *Smiley*, 285 U.S., at 366-67.

The Constitution thus "leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature."); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment.").

Although that power is vested primarily in state legislatures, Congress is tasked with oversight. The balance created by this structure – state legislatures' having the primary role unless supplanted by congressional enactment – was explained by Alexander Hamilton in the Federalist Papers: giving the States primary authority obviated the need to specify all the details in the Constitution itself because it created and assigned "a discretionary power over elections." THE FEDERALIST No. 59 (A. Hamilton). The method "with reason . . . preferred by the convention" was to give power "primarily" to the state legislatures but with "ultimat[e]" oversight by Congress. *Id.*

Congress has actively engaged in its oversight responsibilities: it has required the drawing of single-member congressional districts, established a uniform election day for congressional seats, and required that congressional elections use written or printed ballots. *See* 2 U.S.C. §§2c, 7, 9. Congress has not, however, regulated *when* a state legislature may draw congressional districts. And it most certainly has not barred state legislatures from doing what Texas did here – replacing a court-drawn remedial plan with a legislative plan embodying those policy preferences that courts are not institutionally able to consider.

As the district court observed in its January 6, 2004, opinion, complaints concerning a state legislature's decision to redraw a court-drawn districting plan are properly directed, under our constitutional system, to Congress, not the courts. J.S., at 80a ("[T]hese arguments . . . are directed to the wrong forum."). If a party wishes to affect the balance provided by the Elections Clause – under which the "primary responsibility" remains with the States, *Growe*, 507 U.S., at 34 – it should seek a statute pursuant to Congress's regulatory authority under Article I, §4.

2. The Court has for decades based its redistricting cases on the premise that state legislatures may redraw a court-imposed map in order to express their policy preferences.

Recognizing that the Constitution firmly vests redistricting power in the political branches, the Court has

provided that federal courts must exercise restraint in crafting their own remedial plans, which are to focus on remedying specific violations of federal law while otherwise respecting state policy preferences. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam). In so limiting the role of federal courts, this Court and others have repeatedly recognized that state legislatures retain the power to redraw those court-ordered remedial plans to better express their own policy preferences.

When the Court has confronted situations involving remedial plans, it has often explicitly stated that the state legislature remains free to enact a new plan that better addresses its policy preferences. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[I]t becomes the 'unwelcome obligation' . . . of the federal Court to devise and impose a reapportionment plan *pending later legislative action.*") (emphasis added); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("The *State remains free to adopt other plans* for apportionment, and the present interim plan will remain in effect for no longer than is necessary to adopt a permanent plan.") (emphasis added).

Lower courts have consistently followed that guidance. For example, the district court in *White v. Weiser*, 412 U.S. 783 (1973), indicated that its remedial plan was without prejudice to consideration and adoption of any new plan by the Legislature before the next census. *Id.*, at 789. The Court's subsequent holding that the district court's plan was insufficiently deferential, *id.*, at 795-97, underscores how critical it is to allow a state legislature the full opportunity to replace a court-ordered plan.

In *Johnson v. Miller*, later affirmed by this Court, the district court implemented a remedial plan in the fifth year of a decade, expressly noting that the state legislature was free to replace it with one that better fit the State's policy preferences even before the next census. 922 F.Supp. 1556, 1569 (S.D. Ga. 1995) ("We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to

change it. *That may occur following the millennium census, or before.*" (emphasis added)), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

And in *Bush v. Vera*, the district court explicitly observed that the Texas Legislature remained free to replace the court's plan with its own. After the Court affirmed the district court's original finding that three of the districts in the State's existing plan were unconstitutional, *Bush v. Vera*, 517 U.S. 952, 986 (1996), and after the Governor decided not to call a special session of the Legislature to attempt to enact a plan of the State's choosing, the district court implemented a remedial plan in the sixth year of the decade. *Vera v. Bush*, 933 F.Supp. 1341, 1344, 1352 (S.D. Tex. 1996). The court explained that the State would nonetheless remain able to enact a replacement plan to better fit its political preferences: "[Texas Lieutenant Governor] Bullock and [House Speaker] Laney contend that the Texas Legislature is ready and willing to redistrict during its 1997 regular session. Of course, in any event, *they will have that opportunity* as this Court's remedy is an interim plan . . . ." *Id.*, at 1346 (emphasis added).[72]

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[72] In a remarkable parallel, the Court has already considered whether a State may "voluntarily" redraw a court-ordered map in a decade's third year. After the 1980 Census, Texas was awarded two additional congressional seats. *Upham v. Seamon*, 456 U.S. 37, 38 (1982) (per curiam). In 1981, the Texas Legislature enacted a congressional map that failed preclearance. *Id.* A federal district court drew a remedial plan, which was appealed to this Court. *Id.*, at 40-41. The Court held that the lower court had not been sufficiently deferential to the State's political choices as expressed in its non-precleared plan, and remanded the case for the district court to determine whether there was sufficient time to replace its map before the 1982 elections. *Id.*, at 44. If not, the Court noted, the lower court's map was in any event "only an interim plan and is *subject to replacement by the legislature in 1983*." *Id.* (emphasis added). On remand, the State urged that the district court's map be used in the 1982 election to minimize disruption, and the court agreed, describing its map as a "temporary interim plan for the 1982 primary and general elections." *Seamon v. Upham*, 536 F.Supp. 1030, 1034-35 (E.D. Tex. 1982) (three-judge court). After the court-drawn map was used in the 1982 elections, the Texas Legislature enacted its own map, better reflecting the State's policy preferences, in 1983. Act of May 30, 1983, 68th Leg., R.S., ch.531, 1983 Tex. Gen. Laws 3086.

(Continued on following page)

And here, the 2001 *Balderas* court that drew Plan 1151C explicitly labeled that plan a "remedial" plan, J.S., at 216a, and affirmatively invited the Legislature to step in and alter it:

> "Various parties urged us to create both African-American and Latino minority districts. These districts are not required by law . . . but could be created by the State as long as race was not a predominant reason for doing so. Whether to do so is, however, a *quintessentially legislative question*, implicating important policy concerns. . . . The matter of creating such a permissive district is *one for the legislature*. . . . [The arguments in favor of additional minority districts] are *directed to the wrong forum*, however much we may personally admire the arguments." J.S., at 209a, 212-13a (emphasis added).

Those arguments were later directed to the "right forum," and the Legislature accepted the *Balderas* court's explicit invitation to choose as a policy matter to adopt a new redistricting plan and to create the two new minority opportunity districts that had been sought in 2001.

3. The added gloss of alleged "partisan intent" does not undercut the constitutional delegation of redistricting authority to state legislatures.

Implicitly recognizing that this Court's decisions do not support their arguments (1) that mid-decade redistricting is

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Appellants' various theories ignore at least two lessons of the *Upham* litigation. First, *Upham* demonstrates that a state legislature is permitted to redraw a court-drawn map even after the first election cycle of a decade. Texas did just that in 1983, as it did in 2003. Second, even if a State consents to the use of an interim plan, the Legislature still retains its authority to enact a plan that better fits its policy preferences. In 1981 and 1982, Texas urged both this Court and the district court to use the court-drawn remedial plan in the 1982 elections, and after those elections chose to enact (with the active encouragement of then-Congressman Martin Frost) a new plan in 1983. Appellants offer no reason why Texas could redistrict in 1983 to better implement its policy preferences, but could not do so in 2003.

constitutionally forbidden or (2) that map-drawing with "solely" partisan intent is unconstitutional, Appellants seek to avoid precedent by creating a hybrid theory in which *neither* is categorically barred. Under their proposed test, mid-decade redistricting will be permissible, so long as the Legislature's motive for doing so is mixed or unclear, rather than "for the sole purpose of maximizing partisan advantage." J.S., at i. Likewise, "solely" partisan gerrymandering would be allowed so long as it is conducted in 2001, 2011, 2021, or any other year following a census. Together, however, Appellants urge, the two are impermissible. But the whole is not greater than the sum of its parts, and the fusion of the two theories is no more meritorious than its forebears.

Three Appellants for whom the Court noted probable jurisdiction make the *timing* of Texas's redistricting the centerpiece of their claims.[73] Thus, they explicitly disavow any attack on the *substance* of the map, *see* Part I.C.1, *supra*, presumably because of their inability to marshal a coherent standard under which Plan 1374C would be deemed less fair than Plan 1151C:

> "[Appellants'] challenge does not turn on analysis of the exact effects of the map. Nor does it turn on analysis of the reasons or purposes behind the drawing of any particular lines." Jackson Br., at 22.

Eschewing substance, they are left with timing.[74] But there is no constitutional prohibition on any particular timing, mid-decade or otherwise, when legislatures might choose to redistrict. *See* Part II.B, *supra*. And their entire timing argument is in turn predicated on a concept fundamentally at odds with

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[73] Only the GI Forum Appellants do not make the timing of Texas's redistricting the centerpiece of their arguments.

[74] *See* Jackson Br., at 26 ("Indeed, when legislators redraw lawful districts in mid-decade, courts should presume that action to be purely partisan."); *see also id.*, at 2 ("there was no legal necessity to change the lines"); *id.*, at 17 ("when a lawful map is in place and there is no other legitimate justification for changing the district lines"); *id.*, at 22 ("a challenge to a mid-decade remap needlessly undertaken for solely partisan reasons").

decades of this Court's precedents: that redistricting that is "unnecessary" – that is, not mandated by a court – is for that reason constitutionally suspect.

Appellants invert the constitutional structure. This Court's precedents have never countenanced the notion of "necessary" or "unnecessary" redistricting by a legislature.[75] That is a concept wholly foreign to the Court's jurisprudence. *See Growe*, 507 U.S., at 34; *Branch*, 538 U.S., at 261. Rather, the Court has consistently cabined in *judicial* redistricting to encompass only remedial line-drawing that is legally required. *Weiser*, 412 U.S., at 794-95; *Upham*, 456 U.S., at 41-42. All else, the Court has made clear, is the province of elected legislatures. *See* Part II.B.2, *supra*.

C. Equal-Population Principles Do Not Prevent a State Legislature from Replacing a Court-Drawn Map Based On 2000 Census Data with Its Own Map Based on 2000 Census Data.

Appellants also advance a series of arguments under the banner of "equal population" or "one-person, one-vote." As an initial matter, it bears emphasis that these claims have little to do with traditional one-person, one-vote claims. Indeed, there is no dispute at all that, under the 2000 census numbers, the districts in Plan 1374C are perfectly equipopulous: each district contains exactly 651,619 or 651,620 persons (and the only reason for the one-person variance is that the total number of Texans, 20,851,820, is not evenly divisible by

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[75] The equal-population claims are also about timing rather than substance, condemning "[t]he state's undertaking of the effort at all" to replace a court-drawn plan with one that better fit the State's policy preferences. Travis County Br., at 19; *see also id.*, at 22 & 29; Jackson Br., at 30 (describing the decision to redistrict as "gratuitous[ ]"); LULAC Br., at 14. Accordingly, Appellants explain that their equal-population theory should apply only to "voluntary" redistricting – attacking whether a State can replace a court-drawn map with one that better fits its policy preferences. Travis County Br., at 11 (applying the rule to "judicially unforced, voluntary redistricting"); *id.*, at 15 ("while under no legal compulsion"); *id.*, at 18 ("doing so when there was no legal compulsion"); *see also* Jackson Br., at 30-31; LULAC Br., at 20.

thirty-two). J.A., at 338. Nor is there any dispute that the 2000 census numbers are the most accurate numbers available; indeed, the plan that Appellants champion, Plan 1151C, uses *exactly the same census numbers*.

Hence, Appellants are not seeking the traditional end of a one-person, one-vote claim: a more accurate count. Instead, they readily concede that no more accurate count is possible. Thus, they candidly admit, this claim is merely a pretext for an outright prohibition on "mid-decade" redistricting.[76]

1. Appellants failed to discharge their burden of proving that the new districts are not equipopulous.

The Court has held that, where congressional redistricting plans are challenged on an equal-population basis, plaintiffs "must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld." *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Appellants do not dispute that the State's redistricting map is perfectly equipopulous under the Census Bureau's block-level data released in March 2001.

Appellants instead argue that the State should have used a different set of population data. But Appellants did not prove that any other source of accurate data exists that could be used to draw districts with a smaller population deviation than the State's perfectly equipopulous districts. Nor did Appellants even offer a map based on either of the two conflicting data sources they propose, the limited-purpose Count Question Resolution (CQR) program data or various postcensal population estimates.

These evidentiary failures are fatal to any equal-population claim because of the strong and well-founded

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[76] The Travis County Appellants assert that the district court found their theory to be "a more plausible contention" than some other theories, *see* Travis County Br., at 10, but in fact the court said the theory was "*seemingly* more plausible." J.S., at 2a. (emphasis added).

presumption in favor of using the census enumeration data for redistricting. Even recognizing that decennial census data "measure[] population at only a single instant in time [and] [d]istrict populations are constantly changing, often at different rates in either direction, up or down," *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Court has held that States may rely on the decennial data until replacement data are proven up. This is because "the census data provide the only reliable – albeit less than perfect – indication of the districts 'real' relative population levels . . . [, and] *because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality.*" *Karcher*, 462 U.S., at 738 (emphasis added); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999).

Appellants offered the three-judge court below no alternative map or methodology, instead they simply asserted that the prior court-drawn Plan 1151C must be used. Because both Plan 1151C and 1374C used the identical 2000 census data, Appellants' defense of the former over the latter cannot be understood as a good-faith critique of the data.[77] There is thus no evidence that, if Plan 1151C were used in 2006, it would be any more equipopulous than is Plan 1374C. Consequently, there is no basis to reverse the judgment of the three-judge court rejecting Appellants' claims.

2. Appellants' one-person, one-vote argument is contrary to this Court's precedent treating census data as presumptively valid.

Appellants' argument would also require the Court to disregard established precedent. For example, in *Georgia*

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[77] Indeed, it is Appellants' rule that, if it were possible to satisfy, could potentially "dilute" the standard of "one-person, one-vote," *cf. Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J., concurring), by replacing the presumption in favor of objective census enumeration data with the requirement of using subjective and varying estimates of population change.

v. Ashcroft, the Court expressly approved the legality of using decennial census data throughout the decade:

> "When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But *before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned.*" 539 U.S. 461, 488 n.2 (2003) (emphasis added);[78] *see also Karcher*, 462 U.S., at 738 (same).

The Travis County Appellants urge that this "legal fiction" should not apply when a State "voluntarily" redistricts mid-decade. Travis County Br., at 11, 20; *see also* Jackson Br., at 30; LULAC Br., at 13. As the district court observed when the University Professors *amici* made the same argument below, "[t]he argument as presented comes unadorned with supporting case citations." J.S., at 33a. Instead, it is supported by the repeated assertion that "voluntary" (or, in the words of the Jackson Appellants, "unnecessary") redistricting is inherently suspect.[79] No precedent supports that assertion. *See* Part II.B, *supra*.

None of the "one-person, one-vote" precedents suggests that the principle limits *when* during the same decade a State could rely on the relevant census data. Nor

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[78] Indeed, in that 2003 decision, the Court used *thirteen-year-old census data* from 1990 to evaluate a Voting Rights Act challenge, specifically rejecting the dissent's argument that such data were "irrelevant." *Id.*

[79] The version of the "equal population" rule urged by Appellants does not condemn *how* or *where* the State placed the district lines in 2003, but rather "[t]he state's undertaking of the effort at all" to replace a court-drawn plan with one that better fit the State's policy preferences. Travis County Br., at 19; *see also id.*, at 22 & 29; Jackson Br., at 30 (describing the decision to redistrict as "gratuitous[ ]"); LULAC Br., at 14. Accordingly, they suggest that the rule apply only to "voluntary" redistricting – attacking whether a State can replace a court-drawn map with one that better fits its policy preferences. Travis County Br., at 11 (applying the rule to "judicially unforced, voluntary redistricting"); *id.*, at 15 ("while under no legal compulsion"); *id.*, at 18 ("doing so when there was no legal compulsion"); *see also* Jackson Br., at 30-31; LULAC Br., at 14.

do the Court's cases about the proper role of state legislatures in redistricting erect the "one-person, one-vote" principle as a hurdle faced by a state legislature when it sets out to replace a court-imposed plan with a legislatively-crafted one. Yet, Appellants ask the Court to extend the first line of cases to effectively overrule the second. That result is unfounded.

Indeed, the Court has used the decennial census numbers to assess the population equality of a congressional districting plan that was enacted even later in the decade than was the Texas map. In *Kirkpatrick v. Preisler*, the Court reviewed the population equality of a redistricting plan passed in 1967 using the 1960 census data, referring to it as "the best population data available to the legislature in 1967." 394 U.S. 526, 528 (1969).

3. Appellants' distortion of the "equal population" rule would invert the proper roles of courts and legislatures.

Wesberry v. Sanders requires almost perfect equality between congressional districts. 376 U.S. 1, 7-8 (1964); *see also Karcher*, 462 U.S., at 730. In practice, that high degree of mathematical precision would be almost impossible using any data other than the decennial block-level data. Appellants' rule would thus turn on its head the clear guidance that state legislatures have been delegated primary jurisdiction over redistricting as a constitutional matter. *See Growe*, 507 U.S., at 34; *Upham*, 456 U.S., at 41-42; *Connor*, 431 U.S., at 414-15; *see also Wise*, 437 U.S., at 540 ("[I]t becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a reapportionment plan *pending later legislative action*." (emphasis added)).

Appellants do not attempt to hide the ball with this argument; they readily concede their proposed burden would be impossible to meet. As the district court found,

> "[i]n their briefs and at oral argument, the litigants *conceded that such data do not exist and could not practically be obtained.* The proposed rule is intended to, and would, serve as a means to the end of preventing what Texas did here, to

> redistrict mid-decade to replace a court-imposed plan with one crafted by the legislature." J.S., at 35a (emphasis added).

Thus, although Appellants invoke the rhetoric of "equal population," theirs is yet another complaint about timing, not the substantive equality of district populations.

Tellingly, for this purported "violation," Appellants propose as a "remedy" that the Court order a return to Plan 1151C – the map used in the 2002 Texas congressional elections that was drawn by a federal court in November 2001. Travis County Br., at 30; Jackson Br., at 50. A voter under either map resides in a district drawn according to 2000 census data. J.S., at 37a. If the data have become inaccurate over time, that inaccuracy should equally afflict both maps. There is simply no difference – in terms of *population equality* – between two maps based on when they were drawn.[80]

4. Unlike in *Cox v. Larios*, there is no evidence whatsoever of deliberate deviations from the equal population rule.

Appellants rely heavily on the Court's summary affirmance in *Cox v. Larios*, 542 U.S. 947 (2004). But *Larios* is inapposite. First, in *Larios* the State's map was *not* perfectly equal in population based on decennial census data, and thus the plaintiffs were able to demonstrate an actual and avoidable population deviation. *Larios v. Cox*, 300 F.Supp.2d 1320, 1354 (N.D. Ga.) (three-judge court), *aff'd*, 542 U.S. 947 (2004). Because *Larios* dealt with population disparities in *state* legislative districts in Georgia, which are not governed by *Karcher*'s requirement of absolute equipopulosity for congressional

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[80] Although LULAC suggests that Plan 1374C may have had an adverse effect on Hispanic voters because of the relatively faster growth rate of that population, LULAC Br., at 14, the scant evidence it offered – even had that evidence been admitted at trial, *see* Part II.C.6, *infra* – discusses only Plan 1374C and does not prove that Plan 1374C is better or worse in terms of *population equality* than is Plan 1151C, which was drawn with exactly the same data. *See* LULAC Br., at 18-20.

districts, those state-level districts had population variances of up to 10 percent. *Id.*, at 1327. In contrast, Plan 1374C is perfectly equipopulous, and Appellants have failed to show any *avoidable* population disparity. Second, and critically, the evidence in *Larios* demonstrated that those deviations were deliberate and "systematic[]," underpopulating the favored party and overpopulating the disfavored party. *Id.*, at 1329.[81]

In contrast, there is no such evidence in the case at bar. Instead, the Jackson Appellants repeatedly speculate about what "can" or "could occur," Jackson Br., at 31, never once suggesting that it *did* occur here. And, for good reason: there is no evidence whatsoever that the Legislature even considered such issues, much less acted as in *Larios* to take deliberate advantage of any population deviations.

5. Even had they brought a conventional "equal population claim," Appellants would have failed to meet their burden.

When congressional redistricting plans are challenged on an equal-population basis, the plaintiffs "must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme *must be upheld*." *Karcher*, 462 U.S., at 730-31 (emphasis added). Under *Karcher*, Plaintiffs must prove (1) actual "differences" in population equality among the districts that (2) "could have been avoided" by drawing different district lines.[82] Appellants have failed to discharge that burden.

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[81] Notably, the district court in *Larios* had (before the summary affirmance) used the 2000 decennial census data to draw its own remedial districts. 314 F.Supp.2d 1357, 1363-65 (N.D. Ga. 2004). Thus, while Appellants argue that using the 2000 census data is a violation in this case, in *Larios*, close adherence to the same data was the remedy.

[82] Because they cannot show that any *population deviation* was avoidable, Appellants try to change the question to whether the initial decision to engage in redistricting was "avoidable." *E.g.*, Travis County Br., at 19 ("undertaking of the effort at all was transparently avoidable"). But that has nothing to do with population equality.

The *sine qua non* of an equal-population claim is a showing that the districts could, in fact, have been drawn more equally. This, the Appellants have not done. No Appellant has offered an alternative districting plan that would result in any smaller population deviation than Plan 1374C. They have thus failed to discharge their burden, and their claim should be rejected. *Karcher*, 462 U.S., at 730-31; *accord Larios*, 300 F.Supp.2d 1320, 1353 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

On remand, the Travis County Appellants accurately represented to the trial court that – even taking into account the existence of more recent county-level population estimates and "corrections" issued to certain non-block-level census data – "the relevant populations for one person, one vote purposes ... are not discernable." Travis County Br. on Remand, at 12-13 (docket #207). Although Travis County had offered as one of its only two trial exhibits a "Count Question Resolution" report from the Census Bureau, it made clear that "[t]he city and the county do not rely on this corrected census analysis to establish their case."[83] *Id.*, at 6-7 n.2. That was because, as they candidly told the district court, "the hurdle of developing a rigorous and careful new current population basis may be insurmountably high in a factual sense." *Id.* But *Karcher*

[83] The Count Question Resolution (CQR) program data were not meant to be used for redistricting, nor was it a complete enough data set to be used for that purpose. Accordingly, the Census Bureau expressly qualified the release of CQR data with an official statement that "[t]he CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes." 66 Fed. Reg. 35588-03, 2001 WL 753536 (July 6, 2001) ("The Census Bureau will not change the ... redistricting counts to reflect corrections resulting from the CQR process."). The Texas CQR data do not even cover the entire State, and where the data exist, they exist only at the geographic level of cities and counties – not the block level necessary for congressional redistricting. For this reason, the implication in Travis County's brief that the State should have used "corrected" census numbers, *see* Travis County Br., at 5 & 5n.8, is entirely unfounded.

affirmatively makes it the plaintiff's burden to clear that hurdle, and Appellants have failed to meet it.

Nor could Appellants have shown that any population deviations – had there been any under the 2000 block-level census data – "were not the result of a good-faith effort to achieve equality" so as to shift any burden at all to the State. *Karcher*, 462 U.S., at 731.

The bulk of the Travis County Appellants' allegations that they label a lack of "good faith" actually concern political shifts, not population equality. *E.g.*, Travis County Br., at 7 (discussing "voting trends," "post-2000 political reality," and "election results and voting trends"); *id.*, at 11 ("up-to-the-minute politics, election results, and the local implications of demographic shifts"). When Travis County does cite snippets of testimony that concern population, the evidence demonstrates at most that individual legislators had a general sense of the broad demographic trends in their districts, not that the State made anything less than a good faith effort to fully equalize populations. *See* Travis County Br., at 7-8. That is far from showing that any population deviations – had Appellants met their burden to show them to be "avoidable," which they did not – resulted from an absence of "good faith" about achieving population equality.

6. LULAC did not timely assert any equal-population claim, and did not secure the admission into evidence of its expert affidavit, which in any event is facially unreliable.

LULAC's appeal offers no opportunity to reach any substantive issue related to equal population.[24] LULAC did

[24] LULAC is not a voter who resides in an overpopulated district, and thus lacks standing to assert this claim. *See United States v. Hays*, 515 U.S. 737, 746-47 (1995) (racial gerrymandering); *Larios v. Perdue*, 306 F.Supp.2d 1190, 1209 (N.D. Ga. 2003) (three-judge court) (applying *Hays* to the equal-population rule); *see also* U.S. CONST. art. I, §2 ("by the People of the several States"); *Wesberry*, 376 U.S., at 8.

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not make an "equal population" claim of any kind at trial. Instead, it sought to interpose the claim for the first time *after* remand – and even then failed to comply with the district court's scheduling order.[85] At the same time, LULAC filed a motion seeking to supplement the record with exhibits, including "LULAC Remand Exhibit No. 2" – a purported expert affidavit concerning district populations. That motion was also made more than a month *after* the district court's deadline for the supplementation of the record.[86] *See* Order (Oct. 18, 2004) (docket #195). The State immediately filed an objection to the belated amendment of the complaint and this very late and untested evidence that appeared on its face to be unreliable. *See* State Defendants' Opposition to LULAC's Motion to Amend Its Complaint and LULAC's Motion to Supplement the Record (docket #247).

As LULAC admits, the trial court never ruled on its belated motion to supplement the record.[87] *See* LULAC Br.,

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Although LULAC did not attach its notice of appeal to its jurisdictional statement, *but see* SUP. CT. R. 18.3, that document confirms that LULAC is the only appellant and that no individual voters joined its appeal. Notably, the notice of appeal also characterizes "the Plaintiff's claim" as being "that the State violated the Voting Rights Act ... and the Equal Protection Clause" – omitting any mention of equal population.

[85] LULAC filed a belated motion for permission to amend its complaint on January 14, 2005 – the day on which the *second round* of remand briefing was due and only a week before the hearing in the case. *See* Plaintiff's Motion to Amend (docket #239-1); *see also* Order (Oct. 18, 2004) (docket #195).

[86] LULAC's assertion that it "timely filed" this untested expert affidavit, *see* LULAC Br., at 12 n.22, is difficult to explain.

[87] LULAC suggests that the court must have agreed to accept the exhibit because "the district court opinion refers to the submitted exhibits." LULAC Br., at 12 n.22. For that proposition, LULAC cites the specially concurring opinion of Judge Ward, not the opinion of the court. *Id.* And Judge Ward was quite deliberate in *not* referring either to LULAC's belated claims or to LULAC's untimely and improper exhibit. Judge Ward characterized the "one-person, one-vote" arguments as having been "initially presented by the Travis County parties and now urged on remand by the University Professors," J.S., at 45a, not suggesting that LULAC's claim was before the court. And the mention of LULAC in Judge Ward's opinion was *not of its exhibit at all*, but rather recounts a general example given in LULAC's brief without

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at 12 n.22. Since it was never admitted in the district court, it should not have been attached to LULAC's jurisdictional statement or relied upon in their briefing.

But even were this "Remand Exhibit No. 2" properly a part of the record, it could hardly satisfy LULAC's burden of proof. It contains a two-page affidavit of generalities regarding how the decennial census data are out of date, *see* LULAC J.S., at 55a-56a, followed by extensive curricula vitae and a single quantitative table purporting to show district populations for Plan 1374C computed by some undisclosed method,[88] LULAC J.S., at 83a. That table quite literally does not add up, and even if it did, it would say nothing about whether any such population deviation was *avoidable*. That is, LULAC offers no better plan.

None of the Appellants presented any data superior to the legally-binding 2000 census data. They presented nothing whatsoever at the block level – the level required to draw districts satisfying equipopulosity. Nor did they present or advert to any methodology for discerning any such block-level data other than using census data. Indeed, they explicitly admitted such data were impossible to derive. Accordingly, they failed to carry their burden of proof, *see Karcher*, 462 U.S., at 730-31, and the three-judge court properly rejected their claim.

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suggesting that any evidence bolstered that example. J.S., at 50a. At a minimum, Judge Ward's opinion provides no basis to think the district court had granted either of LULAC's motions.

[88] There is no explanation of how LULAC translated county-level census estimates into the very different geographies of congressional districts. Trying to construct congressional districts out of county- and city-level data would be like trying to rearrange the pieces from one enormous statewide jigsaw puzzle into 32 smaller – but perfectly equally sized – district-sized arrangements. For example, several of the larger counties – such as Travis County, Harris County, and Dallas County – are bigger than any single congressional district. These county-level projections say nothing about *which parts* of Dallas County, *which parts* of Harris County, and *which parts* of Travis County had experienced precisely what levels of relative population change.

D. Adopting Appellants' Theories Would Fundamentally Alter The Constitutional Division Of Authority Between State Legislatures And The Federal Judiciary.

The practical import of adopting any of Appellants' timing-based theories would be to draw a permanent distinction between "necessary" and "unnecessary" redistricting. The primary decisionmaker for redistricting would become the federal courts. Indeed, under Appellants' theories redistricting would be necessary only (1) after a federal court has struck down a map, or (2) after a decennial census, when, under *Wesberry v. Sanders*, a federal court is virtually certain to strike down the old map. Thus, Appellants would make the actual or threatened invalidation by a federal court into the necessary antecedent for any redistricting by a legislature. All other times, redistricting by a legislature would be deemed "unnecessary," "voluntary," or "gratuitous," and hence constitutionally suspect.

Moreover, under Appellants' theories, any time a federal court enacts a map – even a map explicitly labeled as remedial and temporary – the Legislature would be unable to alter that map for the remainder of the decade (because, under Appellants' reasoning, a "legal map" is already extant). Thus, the federal courts would become the "primary" arbiters of redistricting, and the state legislatures would act only when legally "necessary."

There is an *Alice in Wonderland* quality to Appellants' arguments ("up is down, and down is up"), in that they are a precise, symmetrical inversion of the current standards dictated by the text of the Constitution and by this Court's longstanding precedent. As the Court explained in *White v. Weiser*,

> "[f]rom the beginning, we have recognized that '*reapportionment is primarily a matter for legislative consideration* and determination, and that *judicial relief becomes appropriate only when a legislature fails* to reapportion according to federal constitutional requisites in a timely fashion

> after having had an adequate opportunity to do so.' We have adhered to the view that *state legislatures have 'primary jurisdiction'* over legislative reapportionment. . . . In fashioning a reapportionment plan or in choosing among plans, *a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'*" 412 U.S., at 794-95 (citations omitted) (emphases added); *see also Upham*, 456 U.S., at 41-42 (same).

Appellants' many attempts to ban "mid-decade" redistricting – under either the guise of partisan gerrymandering or the pretext of one-person, one-vote – are altogether incompatible with the text of the Constitution and with decades of unbroken precedent from this Court.

III. The District Court's Finding That There Was No Vote Dilution Under §2 of the Voting Rights Act Was Not Clearly Erroneous.

To meet his burden of proof in showing vote dilution under §2, a plaintiff must both show that the *Gingles* preconditions are satisfied and show that the totality of the circumstances demonstrates vote dilution. The three preconditions are: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). "Second, the minority group must be able to show that it is politically cohesive." *Id.*, at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Id.* If a plaintiff proves all three preconditions, then the district court must make a finding whether, under the "totality of the circumstances," the political process is equally open to minority voters. *See id.*, at 79; *see also Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

After an extensive review and careful weighing of the Appellants' evidence and the live testimony at trial, the

district court found that, on this record, the *Gingles* preconditions were not satisfied, and that the State's redistricting map did not, as a matter of fact, dilute minority voting strength. J.S., at 99a-150a. Under the Court's opinion in *Gingles* and Federal Rule of Civil Procedure 52(a), these findings may not be disturbed unless they are shown to be clearly erroneous. Appellants do not, and cannot, make that showing.

A. The District Court's Ultimate And Subsidiary Findings Concerning A §2 Vote-Dilution Claim May Not Be Set Aside Unless Clearly Erroneous.

Although these fact-bound §2 claims have been examined in detail and rejected by a three-judge court well-acquainted with Texas's political landscape, Appellants now ask this Court to hold that the district court "erred when it failed to find that the State's redistricting plan violates the Voting Rights Act." GI Forum Br., at 22; *see also* Jackson Br., at 32. Appellants thus invite this Court, in effect, "to duplicate the role of the lower court . . . [and to] weigh[] the evidence differently." *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). The Court should decline that invitation.

Significantly, this appeal comes to the Court not on a motion to dismiss, nor on summary judgment, but on a final judgment following a full trial on the merits. J.S., at 57a-200a. A district court's findings of fact "shall not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a). Under this standard, when the district court's "account of the evidence is plausible in light of the record viewed in its entirety," that account of the evidence must control the appeal even when the appellate court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S., at 574. If there are "two permissible views of the evidence" then the district court's "choice between them cannot be clearly erroneous." *Id.*; *see also United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). And the deference demanded by Rule 52(a) is "even greater" when the district court's

findings "are based on determinations regarding the credibility of witnesses." *Anderson*, 470 U.S., at 575.

The Court has left no doubt that Rule 52(a)'s clearly-erroneous standard applies to appellate review of a district court's findings concerning minority vote-dilution claims under §2. *Gingles*, 478 U.S., at 78-79; *see also Rogers v. Lodge*, 458 U.S. 613, 622, 627 (1982). This high degree of deference is accorded *both* to the district court's determination of the ultimate "question whether electoral structures had a 'discriminatory effect,' in the sense of diluting the minority vote," *Gingles*, 478 U.S., at 79, as well as to each of the subsidiary findings underlying the district court's ultimate determination, *see Rogers*, 458 U.S., at 623. Application of the clearly-erroneous standard in this context is particularly appropriate because determining "whether the political process is equally open to minority voters . . . is peculiarly dependent on the facts of each case, . . . and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S., at 79 (citations and internal quotations omitted).

As in *Gingles*, the district court in this case was "composed of local judges who are well acquainted with the political realities of the State," *id.*, at 80, and on appeal this Court should give appropriate deference to that court's conclusion that the State's map does not in fact have a dilutive effect on minority voting strength in Texas.

B. The District Court's Finding That the Changes to District 24 Did Not Constitute Vote Dilution Was Not Clearly Erroneous.

The Jackson Appellants challenge whether the State could choose to change the lines of old CD 24 without violating §2 of the Voting Rights Act.

In this Court, they seriously challenge only one aspect of the district court's opinion – whether §2 permits a State to dismantle a district "effectively controlled by African-American voters, merely because it is impossible to draw a district in which African-Americans are an absolute mathematical majority of the population." Jackson Br., at i. Thus, the issue is framed as a challenge to the Court's

statement in *Gingles* that, in a §2 case, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact *to constitute a majority* in a single-member district." 478 U.S., at 50 (emphasis added).

Appellants' question presented is a straw man. Whatever merit there might be to the abstract proposition that a minority group need not constitute an "absolute mathematical majority" to be protected by §2,[89] the facts of this case do not remotely present that issue.

Indeed, *the district court expressly declined to reach* the question that now forms the basis of virtually Appellants' entire appeal concerning CD 24: "[T]he facts of this case offer no occasion to decide if there is a tolerable deviation from the [50%] rule." J.S., at 96a. Not only was the African-American voting-age population of 21.4% far too low to be a sensible deviation from any rule that required a group to "constitute a majority," Appellants' §2 claim was so factually deficient as to offer no need to resolve that legal question.

Nevertheless, the Jackson Appellants devote almost every word of their twelve pages of merits briefing on CD 24 to attacking what they term the "Fifth Circuit's Talismanic '50% Rule.'" *See* Jackson Br., at 32-43. Because the district court expressly declined to apply any such rule, Appellants' extended discussion provides little more than academic background for some future case challenging a lower court decision that might actually apply the 50% rule.

As for what the lower court in this case actually *did* decide, Appellants all but ignore the district court's adverse factual determinations on three critical aspects of their claim – each one of which is outcome determinative.

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[89] As an abstract question, Appellants' assertion that in *Gingles* prong one, "majority" really did not mean majority, is in substantial tension both with the plain text of §2, which protects minorities' ability "*to elect* representatives of their choice," 42 U.S.C. §1973(b) (emphasis added), and with *Gingles* prong three, which would entirely subsume prong one if prong one were read to no longer require a majority. *See* J.S., at 108a-09a; *see generally* Br. of Appellees Tina Benkiser and John DeNoyells.

First, the Jackson Appellants presuppose – wrongly and contrary to the district court's explicit fact findings – that old CD 24 was controlled by African-American voters. To the contrary, the district court expressly found that, to the extent African-Americans had "opportunity" in old CD 24, it was entirely *dependent upon* "Anglos who vote with them in the general election for Democrats," J.S., at 110a-11a. Thus, the district court found, "Anglo Democrats control this district." J.S., at 111a-12a.

Second, the Jackson Appellants devote just one footnote to addressing whether African-American voters were cohesive under the second *Gingles* precondition. *See* Jackson Br., at 40 n.32. The record supports the district court's conclusion that such cohesion had not been shown. J.S., at 111a-12a. It also supports the conclusion that old CD 24 could not have been a so-called "coalition" district because, in primary elections, African-American and Hispanic voters were not remotely cohesive. J.S., at 99a, 111a.

Third, the Jackson Appellants also devote just one footnote to addressing whether they satisfied the third *Gingles* precondition relating to Anglo bloc voting. *See* Jackson Br., at 42 n.34. But the district court rightly concluded that on this record the high crossover voting defeated the §2 claim. J.S., at 110a-11a.

At a minimum, Appellants failed to meet the second and third *Gingles* preconditions. *See* 478 U.S., at 50-51. And because these findings of lack of cohesion and Anglo bloc voting were not clearly erroneous, *see id.*, at 78-79; FED. R. CIV. P. 52(a), and because they provide independent grounds supporting the district court's ultimate rejection of Appellants' old CD 24 vote-dilution claim, *see, e.g.*, *Growe*, 507 U.S., at 40-41 ("Unless these [three preconditions] are established, there neither has been a wrong nor can be a remedy"), this appeal does not present the Court with a meaningful opportunity to address Appellants' hypothetical arguments concerning the 50% rule.[90]

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[90] *See also* NAACP LDEF *Amicus* Br., at 14 (conceding that, even under this proposed rule, "proof of the other two *Gingles* preconditions would remain necessary").

Accordingly, the Court should affirm the district court's judgment, and save a searching inquiry into the meaning and application of *Gingles*'s first prong for a case in which a holding on that issue could impact the judgment.

1. The district court's finding that African-American voters did not control old CD 24 was not clearly erroneous.

Gingles's first precondition – the only one to which Appellants devote any attention in their briefing – requires the complaining minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S., at 50; *see* Jackson Br., at 32-43. Of course, there is no dispute that African-Americans did not constitute a majority in old CD 24; they constituted only 21.4% of the voting age population of that single-member district. *See* J.S., at 107a. Nevertheless, Appellants urge the Court to hold that the first *Gingles* prong about a group being "sufficiently large . . . to constitute the majority" can be satisfied by a group comprising roughly one-fifth the population of the district if that group demonstrates that it "effectively control[s]" its elections. *See* Jackson Br., at i, 32-39.

But the Jackson Appellants build their argument on a false premise. The district court found as a factual matter that African-American voters did *not* control elections in old CD 24. J.S., at 110a-112a. And that finding, which undermines the very core of Appellants' argument, was not clearly erroneous.

a. Appellants' argument depends on low voter turnout by Anglos and Hispanics – both groups being larger than African-American voters – and ignores the largely open Texas primary system.

In old CD 24, African-American voters constituted 21.4% of the voting-age population. J.S., at 107a. Hispanics made up 33.6% of the voting-age population and 20.8% of the citizen voting-age population, J.A., at 337, 339, and Anglos were the largest ethnic group in the district,

making up 40.7% of the voting-age population and 49.8% of the citizen voting-age population. State Exh. 9; J.A., at 339. Thus, African-Americans comprised the *third largest* racial group in the district, or roughly one-fifth of the voting-age population in the district.

The Jackson Appellants' central premise is that the 21.4% of African-American voters in CD 24 controlled the election. But in a winner-take-all election, a group that constitutes just *one-fifth* of the voting-age population can control a particular election outcome only if the remainder of the population acquiesces – either by voting in harmony or by staying home.

The Jackson Appellants hypothesize that control of the Democratic *primary* is tantamount to control of the entire election because a significant number of Anglos and Hispanics will typically turn out for the general election and vote Democratic. Jackson Br., at 41. Thus, the Jackson Appellants' theory depends on the Anglos and Hispanics in the district, *first*, staying home on primary day and, *second*, showing up and voting Democratic on election day.

The nature of this argument – which hinges upon low turnout by the other members of the electorate and makes an artificial distinction between primary and general elections – was explored at the closing arguments after trial, in which the following exchange occurred regarding the relative status of old CD 24 and old CD 25:[91]

> "JUDGE HIGGINBOTHAM: How do these numbers differ from the district in Houston carried by an Anglo [Democrat]?
>
> MR. SMITH: Well, they're not –
>
> JUDGE HIGGINBOTHAM: Tell me the numbers of the two districts.

[91] Old CD 25 was remarkably similar in ethnic composition to old CD 24. It contained 22% African-American voting-age population 30.7% Hispanic voting-age population, *see* J.A., at 337, and 41.2% Anglo voting-age population, *see* State Exh. 9.

MR. SMITH: The two districts are quite similar. The only reason why there's a view that 25 is –

JUDGE HIGGINBOTHAM: They're almost identical.

MR. SMITH: – less – it's not quite as Democratic a district. Mr. Kirk and Mr. Sanchez both carried 25 by only about two percent because there's more Anglo participation in –

JUDGE HIGGINBOTHAM: The difference between the two really is how Democratic they are.

MR. SMITH: *Actually, the difference is that there are more Hispanics taking up space in District 24*, and as a result there is more opportunity for the Democratic vote to come from the African-American community.

JUDGE ROSENTHAL: Again, you just sort of underscored the question that I asked you. *Are you considering Hispanics in 24, quote, filler people*, or are you considering them an active part of this minority coalition that together with the African-American vote demands protection?

MR. SMITH: They are –

JUDGE ROSENTHAL: You seem to be arguing both.

MR. SMITH: Well, I'm suggesting that you ought to look at the primary and the general election separately. *In the primary they are essentially irrelevant* in the sense that if you already have 65 percent of the vote for the African-Americans[,] they control. There are some Hispanics voting as well, but they are never going to overcome the African-American candidate of choice any more than the Anglos will." *See* Tr. of Closing Arg., at 15:19-16:25 (emphases added).

Setting aside that building a voting-rights claim predicated on the *lack* of participation of Hispanic voters hardly seems consistent with the salutary goals of the Voting Rights Act, the Jackson Appellants' theory does not fit the evidence.

Relying on the present lack of involvement of other members of the electorate does not show that African-American voters can elect *their* candidate of choice. Rather, the record demonstrates that, at most, they can elect a Democrat who happens not to offend the sensibilities of the much larger Anglo and Hispanic communities. That does not establish that African-American voters in old CD 24 could have elected, for example, an African-American candidate whom they happened to favor, because such a candidate might very well have broken apart their fragile political coalition. Indeed, because of the political reality of how the Texas primary-election system works,[92] it is foolish to imagine that the African-American voters could exercise meaningful control if Anglo or Hispanic voters were motivated to appear.

Appellants highlight a figure of 64% of the Democratic primary electorate being African-American, *see* Jackson Br., at 40-41 & n.32 – but that figure is quite misleading. After all, in old CD 24, only approximately one out of twenty voters participated in the 2002 Democratic Primary. State Exh. 22. Of that, while 14.5% of African-American voters turned out, only 3.8% of Hispanic voters and a scant 1.3% of Anglo voters did so. State Exh. 22. When Appellants say that "64%" of the primary electorate was African-American, they necessarily ignore the vastly larger number of *potential* primary voters, both Anglo and Hispanic,[93] who could well turn out if motivated to do so.

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[92] Texas does not have party registration. Instead, any Texas voter who has not yet voted in a primary in the same calendar year can choose to vote in *any* primary on election day. *See* TEX. ELEC. CODE §162.002. When they do so, they are then considered to be "affiliated" with that party, but only for the duration of the same year. *Id.* §§162.003, 162.010, 162.012.

[93] Recognizing the problem, the Jackson Appellants say that, "In fact, Anglo Democrats constituted only about 18% of the district's general electorate," adding that, "Far outnumbered by African-American voters, they had no ability to control who the party nominated." Jackson Br., at 41 n.33. As neither statement is supported by a record citation, it is somewhat difficult to sort out precisely what Appellants are arguing. It appears, however, that they are confusing

(Continued on following page)

b. Appellants' expert testimony was itself a sufficient basis for the court's factual finding.

The Jackson Appellants not only failed to carry their burden of proof on this issue; their own expert's testimony provided sufficient evidentiary basis for the district court's factual finding that African-American voters did not control old CD 24.[94]

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two different problems. First, the number "18%" appears to be the percentage of the overall turnout in the general election that is Anglo and votes for the Democrat. Thus, the Jackson Appellants invite a comparison between the 33% figure for African-American voters (whom the Jackson Appellants presume to have voted 100% Democratic) and the smaller 18% number for Anglos who happened to vote for the Democrat. But that says nothing about what would happen *either* if more Anglos were motivated to come to the polls *or* if Anglos who otherwise would have voted for a Democrat instead voted in a racially-polarized manner. Second, equally perplexing is the statement that "[f]ar outnumbered by African-American voters, [Anglo Democrats] had no ability to control who the party nominated." Jackson Br., at 41 n.33. The demographics of the region make clear that African-Americans are far less numerous than either Anglos or Hispanics. The Jackson Appellants are simply talking about turnout rates on primary day, which could easily change if the ballot featured a candidate besides Anglo candidate Martin Frost.

[94] The Jackson Appellants' assertion that the State's expert provided deposition testimony that old CD 24 "performed" for African-Americans, *see* Jackson Br., at 9, is misleading. In his deposition, the State's expert made clear that African-Americans could *not* control the general election in old CD 24, and that in his judgment the old district was not protected by §2 of the Voting Rights Act. *See* Jackson Pls. Exh. 140 (Gaddie expert deposition), at 91; *see also* J.S., at 110a n.114. He did agree at one point that old CD 24 "perform[ed]" for African-Americans: "As I use that term, yes." Jackson Pls. Exh. 140 (Gaddie expert deposition), at 33; *see also* J.A., at 219. But he later explained that old CD 24 "perform[ed]," using his lexicography, simply because the minority candidate of choice was elected, and notwithstanding the fact that the general election was "not . . . controlled by the minority vote." Jackson Pls. Exh. 140 (Gaddie expert deposition), at 98; *see also id.*, at 100 ("*[T]he swing vote is not coming out of the African-American community*. It's coming out of the Anglo community." (emphasis added)).

Beginning first with endogenous races,[95] the data demonstrate that Anglo Democrat Martin Frost has never faced a primary opponent, and so by definition has never faced an African-American primary opponent. J.S., at 111a; *see also* J.A., at 97, 107. Thus, the mere fact that African-Americans have voted consistently for Frost in the primaries (when they had no other choice), hardly demonstrates that they could elect *their* candidate of choice if their preference ever shifted to a different candidate – or, indeed, that they could elect their candidate if Frost were not to run again. Indeed, on the critical measure of ability to elect a candidate of choice – whether African-American voters, if they chose, could elect an *African-American* candidate of choice – there are no data whatsoever from endogenous races. As the district court observed, because "no Black candidate has ever filed in a Democratic primary against Frost," "[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate." J.S., at 111a.[96]

An examination of exogenous races sheds further light on that critical question. The regression analyses offered by Appellants' expert Allan Lichtman demonstrate that African-American voters could *not* effectively control old CD 24 unless their preferences happened to be shared by Anglo voters. Dr. Lichtman examined three exogenous contests: the 1998 Attorney General Democratic primary, a 2002 Court of Criminal Appeals Democratic primary, and the 2002 United States Senate race; he selected those three because they presented direct contests between African-American and Anglo candidates.

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[95] An "endogenous" race is one conducted *only* in the relevant district – such as the congressional race itself. An "exogenous" race is one conducted in a different geography (each as statewide). To analyze an "exogenous" race, data from each voting precinct in the district is reaggregated to isolate how that district's voters voted in the race.

[96] Although there was testimony from one African-American politician that he personally believed he could beat Frost, *see* Tr. 12/17/03 PM, at 126:7-15 (Sen. Royce West), neither he nor any other African-American candidate has ever run in the primary.

In the 1998 Attorney General Democratic primary, the African-American voters of old CD 24 gave 74.3% of their support to African-American candidate "Judge Morris Overstreet, a widely known, respected, and distinguished lawyer and judge." J.S., at 112a; *see* State Exh. 20. Nevertheless, African-Americans were unable to control the primary, because Hispanics and Anglos voted overwhelmingly for Overstreet's Anglo opponent. *See* State Exh. 20. Therefore, Overstreet lost CD 24, 35.3% to 64.7%. *See id.*

In the 2002 Court of Criminal Appeals election, the African-American vote in Dallas and Tarrant Counties fractured, with 40% supporting African-American candidate Whittier, and 60% supporting his Anglo opponent, who ultimately prevailed with large percentages of the Anglo and Hispanic votes. *See* J.A., at 94-95 (Lichtman Report, at 20).

And, in the 2002 Senate race, African-American candidate Kirk prevailed with 99% of the African-American vote in Dallas and Tarrant Counties, 39% of the Anglo vote, and 0% of the Hispanic vote. As the district court found based on the testimony before it concerning Texas politics, the Kirk race was less probative than the first two because he had been a "popular mayor of Dallas" and so the "'friends and neighbors' effect" accounted for some of his strong performance in old CD 24. J.S., at 112a.

Thus, the three exogenous races *introduced by Appellants* yielded one (Overstreet) where the African-American candidate of choice was defeated in old CD 24, one (Whittier) where the African-American vote was fractured and the candidate who won was an Anglo who was also preferred by Anglo voters, and one (Kirk) where the African-American candidate of choice prevailed with a plurality of Anglo support for a popular former Mayor.

This evidence can at best be deemed ambiguous, and a fair reading would tend to show that African-American voters do *not* themselves control the district. Given these data, and the Plaintiffs' ummet burden of proof, the district court's factual finding to that effect was not clearly erroneous.

c. Comparison with old CD 25 further demonstrates that old CD 24 was deliberately designed to be, and in fact was, controlled by Anglo Democrats.

Old District 25 was remarkably similar in ethnic composition to old District 24. It contained 22.0% African-American voting-age population, 30.7% Hispanic voting-age population, and 41.2% Anglo voting-age population. J.A., at 337; State Exh. 9. Like old CD 24, it elected an Anglo Democrat, and, as with old CD 24, Appellants defended the district by arguing that it was "controlled" by African-Americans because African-American voters typically comprised the majority of the Democratic primary, and the Democrat reliably prevailed in the general election. *See* Jackson Tr. Br., at 3 & n.3 (Dec. 3, 2003) (docket #115).

But one wrinkle made defense of old CD 25 a bit more difficult: the incumbent Congressman, Anglo Democrat Chris Bell had in 2002 defeated the African-American-candidate-of-choice, African-American Carroll Robinson, who was preferred by 69% of African-American voters. J.A., at 127-28 (Lichtman Report, Table 17). Nevertheless, Appellants maintained that old CD 25 could not be altered because, in their judgment, it effectively functioned as an African-American opportunity district. *See* Jackson Tr. Br., at 26 n.7 (Dec. 3, 2003) (docket #115).

Under Plan 1374C, old District 25 was transformed into new District 9, which had a markedly greater African-American voting-age population (36.5%). J.A., at 338. In 2004, incumbent Anglo Democrat Chris Bell ran in that new district, and was roundly defeated by an African-American Democrat, now-Congressman Al Green, 66.5% to 31.3%. *See* Election Returns Database, *supra* note 3.

Tellingly, Appellants' arguments about old CD 25 – which had virtually identical numbers to old CD 24 – have completely disappeared from this case. Given the subsequent primary performance, where African-American voters (with substantially increased numbers) overwhelmingly demonstrated that they preferred electing African-American Democrat Al Green to Anglo Democrat Chris

Bell, there simply was no coherent way for Appellants to continue to argue that African-Americans controlled old CD 25 or that Bell was really the African-American candidate of choice.

Since those arguments were repeated by Appellants virtually verbatim with respect to old CD 24 and old CD 25, the inference is plain.

d. Other evidence – including direct testimony from African-American elected officials – confirmed that District 24 was drawn to elect Anglo Democrats.

The trial court's fact finding was further supported by the specific history of the district, including direct testimony of elected officials regarding how the racial dynamics of such a district worked in Texas politics.

The district in question was the product of the 1991 partisan gerrymander that was called the "'the shrewdest [gerrymander] of the 1990s.'" J.S., at 106a-107a. (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2002, at 1448). The architect, both of that statewide gerrymander and of this particular district, was old CD 24's Congressman, Martin Frost. J.S., at 106a-107a. The district linked traditionally Democratic groups throughout the Dallas-Fort Worth metroplex, bridging together a mix of Anglos, Hispanics, and African-Americans.

The circumstances behind the creation of District 24 were discussed at length by African-American Democratic Congresswoman Eddie Bernice Johnson, "who holds a seat in an adjacent largely Black district." J.S., at 107a. She testified that old CD 24's design was no accident; that the district had deliberately been drawn "for an Anglo Democrat." J.S., at 107a. Through combining the opposing groups of African-Americans and Hispanic voters, the 1991 map was designed to ensure that an Anglo Democrat, and only an Anglo Democrat, could win:

> "Q. What type of problems was the Dallas African-American population encountering in terms of being able to create [District 30]?

A. *It was split up, of course, to elect white Democrats.* . . .

Q. . . . I wanted just to ask whether it's your opinion that the Hispanic population is divided across Congressional Districts now in the current plan?

A. To – yes, to a certain degree.

Q. And what would you say is the motivation for that division?

A. I'll have to answer that the same way I answered to my attorney. It's to accommodate others.

Q. And, in particular, white Democrats?

A. Martin Frost." J.A., at 263-65 (emphasis added).

Similar testimony was given at trial by State Representative Ron Wilson, an African-American Democrat elected from the Houston area. He testified:

"Q. I have heard both testimony and argument from one side of the room in this case suggesting that *District 24* up in Dallas is a District that *would elect a Black for Congress if pitted against an Anglo*. What's your thought about that?

A. I think it would elect a Black if it was Martin Frost's long lost, you know, Black child, but . . . [t]here's no way. *There's absolutely no way it could happen*." J.A., at 277 (emphasis added).[97]

* * *

Given the endogenous data, the exogenous data, the comparison to old CD 25, and the unusually candid direct testimony (which the district court heard in open court and deemed credible), the district court's conclusion that old District 24 was *not* controlled by African-Americans is hardly clear error – indeed, it seems the far more plausible hypothesis. As the court explicitly found: "[T]hat Anglo Democrats control this district is the most rational conclusion." J.S., at 111a-112a. That "account of the evidence" – that a congressional district that had been drawn by an Anglo Democrat,

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[97] *See generally* Ron Wilson *Amicus* Br.

for an Anglo Democrat, and had only ever elected an Anglo Democrat was effectively controlled by Anglo Democrats – "is plausible in light of the record" and thus cannot be clearly erroneous. *See Anderson*, 470 U.S., at 574.

2. The district court's finding that Appellants failed to prove cohesion was not clearly erroneous.

On the second *Gingles* precondition – political cohesion by the minority group – the district court made a factual finding that old CD 24 lacked the necessary voter cohesion. Based on the trial evidence, the court found that Appellants failed to meet their burden to prove that African-American voters in the district voted cohesively to support a vote-dilution claim. J.S., at 112a ("Nor is the cohesiveness of this 21.[4]% black voting age population clear.");[98] *see also Gingles*, 478 U.S., at 51 ("the minority group must be able to show that it is politically cohesive"). The district court found, in addition, that there was absolutely no cohesion between the Hispanic and African-American voting populations of old CD 24 so as to support even an arguable "coalition" theory. J.S., at 99a ("Here, there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections."). Those findings are fully supported by the evidence, and are not clearly erroneous.

a. Appellants failed to show cohesion within African-American voters.

To determine whether African-American voters in old CD 24 voted cohesively, the Jackson Appellants' principal statistical expert again focused on three statewide primary races: the 2002 Senate race with African-American candidate Ron Kirk, the 2002 Court of Criminal Appeals race with African-American candidate Julius Whittier, and the 1998 Attorney General race with African-American candidate Morris Overstreet. *See* J.A., at 75-76, 94-95 (Lichtman

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[98] The district court here cited African-American voting-age population as 21.6%, rather than 21.4%, which appears to be merely a typographical error.

Report Tables 2 & 6). According to Appellants' expert, in the first race Mr. Kirk received 99% of the African-American vote, in the second race Mr. Whittier received 40% of the African-American vote, and in the third race Judge Overstreet received 66% of the African-American vote in Dallas County and 76% of the African-American vote in Tarrant County. *See* J.A., at 75-76, 94-95 (Lichtman Report Tables 2 & 6). Thus, in the three races examined by Dr. Lichtman, one (Kirk) reflected strong cohesion among African-American voters, one (Whittier) demonstrated no cohesion whatsoever, and one (Overstreet) showed appreciable but not overwhelming cohesion.

Moreover, as the district court found, results from the Kirk race were of limited probative value. J.S., at 112a. Because Mr. Kirk had previously served as Mayor of Dallas, expert testimony indicated that one would expect a significant "friends and neighbors" increase in his Dallas-area numbers in a statewide race. *See* Tr. 12/12/03 PM, at 97:16-98:24. At trial, Dr. Lichtman attempted to maintain that any such advantage would be offset by the same "friends and neighbors" benefit accruing to his Dallas-area Democratic primary opponent Victor Morales. *Id.*; *see also* J.S., at 112a. Based on its familiarity with Texas politics, the district court unequivocally rejected that argument, noting that while Mr. Kirk was a "former popular mayor of Dallas," Mr. Morales was "actually from Crandall, a town of 3,000 people some 75 miles away." J.S., at 112a.

Discounting the results in the Kirk race, Appellants were left with one race (Whittier) showing *no* African-American vote cohesion and one race, involving a "widely known, respected, and distinguished [African-American] lawyer and judge," J.S., at 112a, (Overstreet) showing *some*. On these facts, the district court's determination that Appellants failed to meet their burden of proving vote-cohesion among the 21.4% African-American voting age population of old CD 24 cannot be clear error. *See, e.g.*, *Anderson*, 470 U.S., at 574 ("Where there are two

permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").[99]

b. Lack of voting cohesion between African-American and Hispanic voters was beyond serious dispute.

Nor could there even arguably have been a "coalition" claim between African-American and Hispanic voters because the data showed that, in primary elections, they tended to vote as polar opposites. As the district court rightly found, "there is no serious dispute but that African-Americans and Hispanics do not vote cohesively in primary elections." J.S., at 99a.[100]

The Court has explained that, "[a]ssuming (without deciding) that it [is] permissible . . . to combine distinct ethnic and language minority groups for purposes of assessing compliance with §2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, *proof of minority political cohesion is all the more essential*" and must meet a "higher-than-usual" standard. *Growe*, 507 U.S., at 41 (emphasis added); *see also Page v. Bartels*, 248 F.3d 175, 197 (CA3 2001). Appellants not only failed to demonstrate a "higher than usual" level of cohesion between African-American and Hispanic voters in old CD 24; they failed to show *any* cohesion between these minority groups whatsoever. *See* J.S., at 110a-11a. ("That there is no

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[99] Appellants' only response to this *claim-dispositive* finding comes in a lone footnote, where they summarily state – without citation to any authority – that the district court "clearly erred" in its conclusion because §2 "liability turns not on perfect unanimity within the minority." Jackson Br., at 41 n.32. That may be so, but "perfect unanimity" is a world away from the evidence before the district court, showing that while 72% of African-American voters voted for the African-American candidate in one probative race, only 40% of African-American voters voted for the African-American candidate in the other. As the court reasonably concluded, on this record the evidence did not prove cohesion. J.S., at 112a.

[100] The district court correctly noted that two groups cannot be deemed cohesive under *Gingles* unless they vote together in both primary and general elections. J.S., at 99a-100a n.88 (citing *LULAC v. Clements*, 999 F.2d 831, 850 (CA5 1993) (en banc)); *cf. Growe*, 507 U.S., at 42.

cohesion between Black and Latino voters in the primary contests is beyond serious dispute.").[101]

Dr. Lichtman's analysis amply demonstrated this complete absence of cohesion. For example, in the Kirk primary he found African-American voters supporting the African-American candidate Kirk at a rate of 99% and Hispanic voters supporting the Hispanic candidate Morales at a rate of 90%; in the Kirk runoff, he found African-American voters supporting Kirk at a rate of 98%, and Hispanic voters supporting Morales at a rate of 100%. J.A., at 94-95 (Lichtman Report Table 6). Likewise, in the Overstreet race, Dr. Lichtman found that while 66% of African-American voters in Dallas County voted for African-American candidate Mr. Overstreet, 0% of Hispanic voters did. Notably, the Overstreet race was not even an African-American-Hispanic race; rather, 100% of Hispanic voters in the CD 24 voted for the Anglo candidates on the Democratic ballot. J.A., at 94-95 (Lichtman Report Table 6). Thus, far from demonstrating cohesion between African-American and Hispanic voters in CD 24, the data demonstrated that, in contested primaries, the two groups were virtually at war.[102]

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[101] It is no answer for Appellants to respond that African-American and Hispanic voters demonstrated vote cohesion in *general* elections (which is to say no more than that, in CD 24, both groups tend to be Democrats). The entire linchpin of Appellants' argument as to how the 21.4% of African-Americans in old CD 24 could "control" the election was the premise that they "control" the primary; the open antagonism between African-American voters and Hispanic voters in contested primaries fundamentally undercuts that premise.

[102] Hence, the reason why, even "[a]ssuming" that one can theoretically "combine distinct ethnic and language minority groups for purposes of assessing compliance with §2," the Court has demanded, at a minimum "higher-than-usual" "proof of minority political cohesion." *Growe*, 507 U.S., at 41. Appellants have described old CD 24 as "majority-minority," J.A., at 97, which is technically true, with respect to VAP, which totals 54.6% for Hispanics plus African-Americans, but is not true for the more relevant CVAP, which totals 46.3%. J.A., at 98, 337, 339. But, given the complete animosity between African-Americans and Hispanics in contested primaries, Hispanic voters could be counted on to vote in unison against any African-American candidate, which is a large part of what ensured (as intended) that CD 24 could only elect an Anglo Democrat.

The district court also heard direct testimony confirming these data. For example, State Senator Royce West – an African-American Democrat who lived in old CD 24 and was elected from and represented much of that area in the State Senate for eleven years – expressly acknowledged the lack of cohesion between African-American and Hispanic voters in Democratic primaries:

> Q. [In] [p]rimary elections, [i]n a race where an African-American candidate is running against an Hispanic candidate, in your experience, do voters in CD 24, do African[-Americans] and Hispanics tend to vote together or do they tend to vote opposed to each other?
>
> A. Opposed to one another.

Tr. 12/17/03 PM, at 129: 20-25-130:1, J.A., at 259.[103]

On this record, there was no clear error in the district court's conclusion that Appellants failed to carry their burden of demonstrating a cohesive minority population in old CD 24. And under *Gingles*, that conclusion is fatal to Appellants' §2 claim. *See* 478 U.S., at 51.

3. The district court's finding that Appellants failed to show Anglo bloc voting against minority candidates of choice was not clearly erroneous.

The district court also found against Appellants on the third prong of *Gingles* – sufficient Anglo bloc voting to usually defeat the minority candidate of choice. *See id.* The court found that: "Black opportunity here lies in coalitions with Anglos who vote with them in the general election for Democrats." J.S., at 111a.[104]

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[103] Senator West likewise acknowledged that, in Democratic primary elections between African-American and Anglo candidates, there was no "tendency that predominates" in favor of Hispanic and African-American voters voting together. *Id.*, at 130:2-19, J.A., at 259.

[104] The district linked traditionally Democratic groups throughout the Dallas-Fort Worth metroplex, bridging together a mix of Anglos, Hispanics, and African-Americans. "The 24th is a Democratic district, and its 'coalitions' are simply minority Blacks joining with majority

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The district court's conclusion was, once more, well-supported by the trial evidence. Looking again to Dr. Lichtman's numbers for the three races he examined in Dallas and Tarrant Counties – the geographic region in which Appellants sought to prove the *Gingles* factors – in the 2002 Senate primary and runoff African-American candidate Kirk received 39% and 48% of the Anglo vote respectively; in the 2002 Court of Criminal Appeals race African-American candidate Whittier received 32% of the Anglo vote; and in the 1998 Attorney General primary African-American candidate Overstreet received 8% of the Anglo vote in Dallas County and 0% in Tarrant County. J.A., at 75-76, 94-95 (Lichtman Report Tables 2 & 6). Thus, in the three races examined by Dr. Lichtman, one (Kirk) demonstrated a complete absence of Anglo bloc voting, and one (Whittier) reflected substantial Anglo crossover. Only one (Overstreet) suggested that Anglo bloc voting could be in play.

Indeed, the unweighted mean of Dr. Lichtman's numbers yielded an Anglo crossover rate of 30.75%, a figure in the same range as those on which this Court has previously upheld a district court's finding that there was no Anglo bloc voting under *Gingles* prong three. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (finding no §2 violation where "the average percentage of Whites voting for black candidates across Georgia ranged from 22% to 38%"); *see also Page v. Bartels*, 144 F.Supp.2d 346, 365 (D.N.J. 2001) (finding no racial bloc voting where plaintiffs' expert testified that Anglo crossover voting averaged 35.6%).[106]

Anglos voting a Democratic ticket in the general election." J.S., at 105a-06a.

[106] In *Abrams*, the lower court also considered the significant successes achieved by minority candidates. *Abrams*, 521 U.S., at 92. Recent Texas history shows considerable success by minority candidates, who have won multiple statewide offices by garnering significant Anglo support. For example, Chief Justice Wallace Jefferson and Justice Dale Wainwright of the Texas Supreme Court are both African-Americans who have won statewide elections to the bench, and Michael Williams is an African-American who won a seat on the Railroad Commission, which governs much of the Texas oil industry. Likewise, Railroad Commission Chairman Victor Carrillo is an Hispanic elected

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Again, direct evidence confirmed the statistical data before the district court. On cross-examination, African-American and Democratic State Senator Royce West disclaimed district-wide Anglo bloc voting in old CD 24:

> We have a pretty good coalition right now of African-Americans, Hispanics and Anglos working together. So I can't think of any specific instances . . . where here recently I've seen that polarized voting as it relates to the Congressional District.

Tr. 12/17/03 PM, at 131:7-11, J.A., at 260.

On these facts, the district court's finding that Appellants failed to meet their burden of proving *Gingles*'s third precondition was not clearly erroneous. *See Gingles*, 478 U.S., at 51, 79; *Anderson*, 470 U.S., at 574 ("When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). [106] And, like the prior two findings, it disposes of their claim.

C. In Any Event, The So-Called "Dismantling" Claims Are Ill-Conceived.

Two Appellants present what they style as "dismantling" claims, arguing that §2 prevents the State from making any changes to the district lines present in Plan 1151C for District 23 and for District 24. Jackson Br., at

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statewide in Texas, and former Supreme Court Justices Alberto Gonzales and Raul Gonzalez and former Railroad Comission Chairman Antonio Garza were all also Hispanics elected statewide.

[106] Again, Appellants' only response to this determination comes in a single footnote, where they assert that "[t]he fact that roughly 30% of Anglo voters in District 24 regularly supported African-American-preferred candidates in the general elections does not undermine a finding of racially polarized voting." Jackson Br., at 42 n.34. They state that *Gingles* found white bloc voting even with a crossover rate as high as 42%. Jackson Br., at 42 n.34 (citing *Gingles*, 478 U.S., at 78-80). But in *Gingles*, the Court was *affirming* a trial court's finding of fact under the clearly erroneous standard; the case hardly stands for the proposition that a 30.75% average could *not* support a district court's finding to the opposite effect. Indeed, in *Abrams* the Court affirmed a factual finding of the absence of bloc voting when the statewide crossover rates were in the range of 20% to 38% and crossover in the relevant congressional district was 23%. 521 U.S., at 92.

32-33; GI Forum Br., at 27-36. Each Appellant offers a similar logic – they assert that the preexisting district was a "protected" district under the Voting Rights Act (presumably under §5 of the Act) and accordingly, they assert, the State cannot make changes to that district. Jackson Br., at 32-33; GI Forum Br., at 27-36.

To the extent that Appellants want to entrench the old status quo – to prevent the State from moving the lines of these districts at all – that far oversteps the reaches of §2. Under §2, the State retains the latitude to choose *how* to cure even proven vote dilution. Although a successful §5 claim alleging that a covered action has not been precleared can force the State to return to the prior state of the law, *see Lopez v. Monterey County*, 519 U.S. 9, 20 (1996), a successful §2 claim still would afford the State the opportunity to draw a legal plan that reflects its own policy choices, *see Growe*, 507 U.S., at 32-34.

Appellants' theory improperly blurs together §2 and §5 of the Voting Rights Act. As Justice Kennedy noted in the plurality opinion in *Holder v. Hall*,

> "[t]o be sure, if the structure and purpose of §2 mirrored that of §5, then the case for interpreting §§2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application." 512 U.S. 874, 883 (1994) (plurality).

Thus, "[r]etrogression is not the inquiry in §2 dilution cases." *Id.*, at 884 (citing S.REP. No. 97-417, at p.68, n.224 (1982) *as reprinted in* 1982 U.S.S.C.A.N. 177, 246 ("Plaintiffs could not establish a §2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the strength of a minority group.")).

Appellants' novel reading of §2 of the Act would also undercut the Court's recent decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), by rendering State's discretion of *how* to comply with the Act virtually meaningless. The *Ashcroft* Court held that §5 leaves with States the choice between influence districts and majority-minority districts: "Section 5 does not dictate that a State must pick one of these methods

of redistricting over another." 539 U.S., at 480. The Court described that choice as a political one – "the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable." *Id.*, at 483.

Appellants suggest, however, that the political latitude recognized by *Ashcroft* concerning §5 – "the flexibility to choose one theory of effective representation over the other" – is illusory because it is taken away by §2 of the same Act. *Id.*, at 482. But the Court has made clear that it has no desire to allow §2 to blur into the very distinct standards of §5, and vice versa. *See id.*, at 478-79 ("We refuse to equate a §2 vote dilution inquiry with the §5 retrogression standard."). Appellants would read §2 to require that courts rather than legislatures choose among influence districts, coalition districts, and majority-minority districts. That proposition was flatly rejected by *Ashcroft*.

In practical terms, Appellants' rule would also erect a barrier to any State that wished to accept the Court's invitation to explore alternate models of compliance with §5. In *Ashcroft*, the Court held that the efforts of a State to unpack formerly concentrated majority-minority districts to create influence districts was not in itself a violation of §5 of the Act. *Ashcroft*, 539 U.S., at 479-80. But if Appellants' reading of §2 is to be believed, Georgia would have surely violated §2 by doing precisely what the Court eventually blessed – reducing the concentration of a majority-African-American district in order to afford more electoral opportunity elsewhere in the map.

Accordingly, it is backwards for Appellants to suggest that – by recognizing a §2 cause of action to force a State to create "influence" or "coalition" districts – one might avoid the unnecessary packing of voters. Jackson Br., at 34. That was the reasoning explained by the *Ashcroft* Court for why a State should have latitude – so that, consistent with the State's policy preferences, it might choose a model of representation to comply with the Act that involved less packing of voters. 539 U.S., at 482. But §2 works very differently – it empowers plaintiffs to *force* the State to pack or unpack voters. In this case, the

Jackson Appellants seek the re-packing of voters into old CD 24. If their claim is approved, no doubt creative plaintiffs will attempt to force other States to create more 20% African-American districts in Democratic-leaning areas so that they, too, can claim that the Anglo Democrats those districts elect cannot be ousted from office without offending the Voting Rights Act.

That, of course, is not what the Voting Rights Act requires. The Voting Rights Act protects minority rights, not the electoral successes of a particular political party. And *Ashcroft* give States wide latitude to decide the specific means of protecting minority rights – in Texas, by creating an additional African-American and an additional Hispanic opportunity district. And nothing in the Voting Rights Act prohibits altering or dismantling existing Anglo Democratic districts to expand minority opportunity in majority-minority districts.

D. The District Court's Determination That GI Forum's Proposed Plan 1385C Was Not Required by §2 Was Not Clearly Erroneous.

The GI Forum Appellants claim that Plan 1374C diluted Hispanic voting strength in South and West Texas – a region in which Hispanics constitute 58% of the citizen-voting-age population – because only six of the seven congressional districts drawn there were Hispanic-opportunity districts. *See* J.S., at 123a-24a, 129a. Appellants offered a demonstration plan (Plan 1385C) that purported to draw an additional Hispanic-opportunity district in South and West Texas – thus bringing Hispanic control over congressional districts in that area to a perfectly maximized seven-for-seven. J.S., at 124a.

The district court rightly focused on two aspects of the GI Forum demonstration plan – whether the demonstration districts are effective so as to offer *more* electoral opportunity to Hispanics, and whether earmarking seven-of-seven districts in the South and West Texas would be disproportional.

The district court found both that the demonstration plan would not satisfy the first prong of *Gingles* and that,

under the totality of the circumstances, there was no violation of §2. As for the first prong of *Gingles*, the district court found that the demonstration plan was insufficient because it spread population too thinly and required district configurations that would not be effective. J.S., at 138a. As for the totality finding, the district court noted its reliance on "detailed regression analyses of election data, performed by different experts," J.S., at 140a, "witnesses familiar with the areas covered," J.S., at 144a, and "testimony of elected officials from the districts at issue," J.S., at 145a. On that detailed record, the court explicitly found that "[t]he totality of facts and circumstances, including those pointing to proportionality, as well as past and predicted election outcomes and evidence as to the likely functioning of the newly-configured districts, does not show a violation of §2 in South and West Texas under Plan 1374C." J.S., at 149a.

1. The district court's factual finding on the first *Gingles* precondition was not clearly erroneous.

The court found against the GI Forum Appellants on the first prong of *Gingles*, the requirement that a demonstration plan "creat[e] more than the existing number of *reasonably compact* districts with a *sufficiently large* minority population to elect candidates of its choice." *De Grandy*, 512 U.S., at 1008 (emphasis added); *see also Growe*, 507 U.S., at 40. That finding was not clearly erroneous.

Although Appellants' demonstration plan had *nominal* citizen-majorities of Hispanics, it could achieve that mathematical mark only by spreading the Hispanic population out in a way that the district court found would create majorities too thin and too geographically dispersed to be politically effective. Thus, the district court found that the demonstration plan would not meet the first precondition of *Gingles* because "[t]here is neither sufficiently dense and compact population in general nor Hispanic population in particular to support such a configuration." J.S., at 138a.

The district court found that Appellants' demonstration districts had majorities too thin to be effective. In particular, CD 28 in the demonstration plan would have had only a 50.3% Hispanic citizen voting-age majority. J.S., at 130a. The district court considered testimony from experts for both plaintiffs and the State indicating that, because of low turnout rates, more than nominal majorities are needed for politically effective Hispanic-opportunity districts.[107] J.S., at 131a n.134. For those reasons, the court found that Hispanic citizens of voting age were not sufficiently numerous in the region to form seven effective districts. J.S., at 133a.

In so doing, the district court noted that Appellants' demonstration districts were not particularly compact. J.S., at 125a-26a n.125. It observed that the demonstration districts were relatively more "unusual" in shape than the State's districts and that the joining together of "disparate and distant communities" in the demonstration plan would render it more difficult for Hispanics to exercise political power given the smaller majorities they would hold in when spread among seven districts. *Id.* Those findings were not clearly erroneous.

2. The district court's factual finding on the totality of circumstances was not clearly erroneous.

The district court found, based on its review of the record, that the totality of circumstances did not favor the creation of a new Hispanic-opportunity district in South and West Texas.[108]

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[107] Representative Rubén Hinojosa, who represents CD 15, testified that because of low turnout rates, voter levels of approximately 57%-58% were necessary to achieve Hispanic control. J.A., at 243-44. Representative Charlie Gonzalez, who represents CD 20, also testified about the low voter turnout that afflicted the region. J.A., at 231-32.

[108] Even if effectiveness were not encompassed within the *Gingles* preconditions, the ultimate totality of the circumstances would encompass precisely the factors considered by the district court. *See De Grandy*, 512 U.S., at 1011 (indicating that the totality inquiry must make precisely such "judgments resting on comprehensive, not limited, canvassing of relevant facts"). As Appellants admit, the district court

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As a part of its examination of the totality of the circumstances, the three-judge court followed the dictate of *De Grandy* and considered whether the minority group had already achieved substantial proportionality of representation. J.S., at 126a-30a. The court did not treat proportionality as necessarily dispositive, but instead as "only one factor to be used in assessing the totality of circumstances to determine if unlawful vote dilution has created an 'unequal political and electoral opportunity' for a protected class." J.S., at 127a n.127 (citing *De Grandy*, 512 U.S., at 1022). Based on the entire record – including proportionality – the district court found that the totality of the circumstances did "not show a violation of §2 in South and West Texas under Plan 1374C." J.S., at 149a.

a. As in *De Grandy*, Appellants focused their claim on only one region of the State, making a regional analysis appropriate.

In *De Grandy*, the Court held that it did not need to reach the question of what geographic focus was appropriate to assess proportionality because the §2 claim at issue related only to a particular region; likewise the GI Forum Appellants' §2 claim expressly focuses on a single region of the State.[109] *Compare* J.S., at 127a-30a (noting that Appellants' *Gingles* challenge was so limited), *with* 512 U.S., at 1021-22 (noting that plaintiffs in *De Grandy* had chosen to focus on a specific area).

Throughout their brief, the GI Forum Appellants discuss their claims in terms of its impact on South and

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concluded that "under the totality of the circumstances, the GI Forum demonstrative districts did not afford Hispanic voters the opportunity to elect their candidate of choice." GI Forum Br., at 43. Given that the demonstration plan spread out the Hispanic population more thinly, and into districts that were less compact and cohesive, the three-judge court's totality finding is well supported on this record.

[109] The district court observed that there was no need to decide this question because the State achieved substantial proportionality both for the region and statewide. *See* J.S., at 127a-130a.

West Texas. *See* GI Forum Br., at 12 (focusing on "South and West Texas"); *id.*, at 13 (referring to "all seven Hispanic-majority districts created by the State in South and West Texas"); *id.*, at 40 ("The parties agree that South and West Texas are characterized by racially polarized voting."); *see also id.*, at 4 (referring to the 58 county region in which the State drew seven districts); *id.*, at 36 ("The State chose to expand the territory by which it drew Hispanic-majority districts by adding 14 whole or partial counties."); *id.*, at 38 (referring to "the decision to expand the redistricting territory and the number of districts located in the majority Hispanic South and West Texas"). They call their demonstration plan "a simple rearrangement of the boundaries of the State's seven Hispanic districts." GI Forum Br., at 40. Indeed, the demonstration map GI Forum introduced included districts *only* in South and West Texas, with the remainder of the map left blank. *See* GI Forum J.S. App., at 241.

Because the vote-dilution claim was expressly framed in terms of South and West Texas, that is the area in which the totality of circumstances – including its proportionality component – must be assessed. In *De Grandy*, the Court held that where the parties agreed in the district court on the area covered by the §2 claim, that area controls proportionality: "Thus, we have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on *the appropriate geographical scope for analyzing the alleged §2 violation and devising its remedy*." *De Grandy*, 512 U.S., at 1022 (emphasis added).

b. The district court rightly found that Hispanics were proportionately represented in South and West Texas.

In South and West Texas, there can be no question that Hispanics enjoy substantial proportionality. Because Hispanics comprise 58% of the relevant population and, under Plan 1374C, can effectively control six of the seven

congressional seats (84%), the district court found that "proportionality is satisfied as to that area." J.S., at 494.

If an additional Hispanic-opportunity district were created in South and West Texas, it would give 58% of the relevant population control of 100% of the congressional districts. That sort of required "maximization" of potential majority-minority districts was explicitly rejected in *De Grandy* as an improper use of §2. 512 U.S., at 1022 (holding that the district court erred in not "address[ing] the statutory standard of unequal political and electoral opportunity," and that it "reflected instead a misconstruction of §2 that equated dilution with failure to maximize the number of reasonably compact majority-minority districts").

Indeed, the breadth of Appellants' claims mirrors a hypothetical that the Court gave in *De Grandy* of how a failure to consider proportionality would render §2 "absurd." *See De Grandy*, 512 U.S., at 1016-17. The Court hypothesized a State with voters spread evenly among ten districts, in which 40% of the voters were members of a minority group. *Id.* Although a proportional number would be four districts, under a maximization rule that group could achieve control of up to seven districts – a level of representation 75% more than proportionality. *Id.* The Court concluded that such a disproportionate result cannot be required because "it would be absurd" to read §2 to provide "a minority group with effective political power 75% above its numerical strength." *Id.*, at 1017.

The statistics in South and West Texas bring the *De Grandy* hypothetical to life. Hispanics make up 58% of the relevant population in the region. An arithmetically proportional level of representation would thus be four of the seven seats. Plan 1374C, in turn, gives Hispanics control of six of the seven congressional seats. And Appellants ask instead that Hispanics control all seven districts. This would create exactly the same "absurd" situation warned against in *De Grandy*. *Id.*

The Court has held that requiring maximization is inconsistent with "the very object of the statute." *De Grandy*, 512 U.S., at 1016-17. An alleged "[f]ailure to

maximize cannot be the measure of §2." *Id.*, at 1017. Thus, in *De Grandy* the Court held that, when a group has achieved opportunity substantially proportional to its share of the relevant population, that fact weighs heavily in the totality of circumstances. 512 U.S., at 1000.

Appellants accuse the district court of using its effectiveness analysis to create "a cap on the proportionality" that a minority group could achieve. GI Forum Br., at 46. That argument misses the point of the district court's focus on effectiveness. If districts are not *effective* districts, they will not improve the political opportunity held by Hispanics and are not required to be created by the Voting Rights Act. In that regard, the district court's treatment of effectiveness in its totality analysis mirrors the Court's description in *De Grandy* of the first *Gingles* factor as "requir[ing] the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S., at 1008.[110]

Appellants also attempt to characterize the State's proportionality argument as involving a district "located in one area of the state" being traded for a district "in a different area of the state." GI Forum Br., at i. There is only one "area of the state" at issue: South and West Texas. The districts in question – old CD 23 and new CD 25 – are *both* in the region for which GI Forum has sought to prove a §2 violation. *See* GI Forum J.S., at 241 (map). Thus, the instant case is unlike *Shaw II*, in which the State attempted to draw a district *outside* of the region of an alleged §2 violation. *Shaw v. Hunt*, 517 U.S. 899, 916-17 (1996) (*Shaw II*). There, such a district could not be a required "remedy" because it was not related to the "injury." *Id.*, at 917.

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[110] In *De Grandy*, the Court declined to consider the question of whether to apply a supermajority requirement to Hispanic districts. 512 U.S., at 1008-09. The Court did not need to reach that theoretical question because proportionality resolved the case. *Id.*, at 1009. For the same reason, there is no cause to reach the question here.

c. The district court also found substantial proportionality for Hispanics on a statewide basis.

The district court also addressed the question of whether the State's districts could meet proportionality on a *statewide* basis. J.S., at 149-50a. It concluded that – looking beyond the mathematical measures, as *De Grandy* counseled, 512 U.S., at 1023 – the record suggested substantial proportionality on a statewide basis.

Statewide, Plan 1374C provided six Hispanic-opportunity districts – a number one below what would be expected for pure "arithmetic proportionality," which would assign the group a share of the congressional delegation precisely matching its share of the relevant population. But the district court emphasized that having only six Hispanic-opportunity districts did not necessarily mean that the State's plan was not substantially proportional. J.S., at 129a-30a ("*De Grandy* emphasizes . . . that the inquiry is not merely mathematical."). As other factors weighing in the totality, the district court noted that Hispanics held substantial influence in at least two other districts that were not technically Hispanic-opportunity districts. J.S., at 129a-30a (discussing new CD 29 in Houston, where Hispanics comprise approximately 47% of the relevant population, and new CD 23, where the incumbent is an Hispanic Republican who has historically attracted substantial Hispanic crossover support). On that record, the district court found that the totality of circumstances did not support drawing a seventh Hispanic-majority district in South and West Texas.

Appellants dispute two aspects of the district court's findings about statewide proportionality. They cite 2004 census estimates for Hispanic citizen-voting-age population – figures that came out *after* the trial and that would be disconnected from any census block-level data available for drawing remedial plans – to suggest that proportionality should now require eight districts instead of seven. *See* GI Forum Br., at 48-49. But the district court found at trial that the Hispanic citizen-voting-age population of Texas was 22%, leading to seven districts as the number

that would achieve perfect "arithmetic proportionality." J.S., at 130a. That finding was not clearly erroneous.

Appellants also suggest that new CD 23 cannot be an influence district notwithstanding that Henry Bonilla, an Hispanic Republican, historically attracted significant Hispanic support from old CD 23 before 2002 and continues to do so in new CD 23. GI Forum Br., at 35.

Throughout his career, Congressman Henry Bonilla has attracted substantial support from the Hispanic community. Raised in the barrios of south San Antonio, Congressman Bonilla defeated a four-term incumbent Hispanic Democrat, earning 59% of the vote in a district drawn to elect a Democrat. He has since been reelected six times by garnering significant Hispanic support in the district. There is no disputing that Congressman Bonilla is a product of, and genuinely responsive to, the Hispanic community in his district.[111] *See generally* Brief of *Amicus Curiae* Congressman Henry Bonilla.

Appellant GI Forum places great focus on the relatively limited (8%) Hispanic support Congressman Bonilla received in 2002, *see, e.g.,* GI Forum Br., at 8, 30, 35, but they fail to mention that his opponent, Henry Cuellar, was a very popular local politician in Laredo who benefited substantially from the "friends-and-neighbors" effect. *See* MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2006, at 1657. Indeed, the very next election, Cuellar ran against incumbent Democrat Ciro Rodriguez in CD 28 (which now include large parts of

[111] Indeed, American GI Forum, the national parent of Appellant GI Forum of Texas, has publicly praised Congressman Bonilla's "great sensitivity to the special issues" affecting Hispanic veterans, and the "excellent working relationship" between Congressman Bonilla's office and GI Forum. Letter from Juan R. Mireles, National Commander, American GI Forum of the United States, to the Hon. Henry Bonilla, Member, United States House of Representatives (Sep. 24, 2002). Commander Mireles specifically thanked Congressman Bonilla for "being a voice and effective advocate" for Hispanic veterans. *Id.*

Laredo), and defeated him in the Democratic primary. Election Returns Database, *supra* note 3.

After the aberrational race in 2002, Congressman Bonilla's support returned to historic levels in 2004, as he won 23 of the 25 counties in his district, "some of them 85% to 95% Hispanic." *See* BARONE & COHEN, at 1657. Notably, he also carried the half of Webb County that remained in new CD 23 by a margin of 56% to 41%, *see* Election Returns Database, *supra* note 3, putting to rest any notion that Hispanics in that heavily-Hispanic county were "stranded" by the new map. *See* Bonilla *Amicus* Br., at 13-14.

By any measure, the district court's factual finding that considered CD 23 in its proportionality analysis was not clearly erroneous.

E. The District Court's Finding That the Split of Webb County Did Not Violate the Voting Rights Act Was Not Clearly Erroneous.

GI Forum argues that the State should not have been permitted to alter the district boundary of old CD 23 – the district then and now held by Representative Henry Bonilla, an Hispanic Republican. *See* GI Forum Br., at 36-38. In particular, GI Forum asserts that the State moved roughly 100,000 people (largely Democratic-voting Hispanics) from Webb County into the neighboring CD 28, an Hispanic-opportunity district, while leaving many more Hispanics in CD 23. GI Forum Br., at 24. GI Forum claims that the State "stranded" those other Hispanics in new CD 23, a district that cannot elect their candidate of choice. *Id.*, at 35.

But old CD 23 elected the very same candidate. As the district court expressly found, "[e]ven under Plan 1151C . . . Congressional District 23 did not function as an effective opportunity district."[112] J.S., at 134a. The district

[112] GI Forum states the opposite in its brief, *see* GI Forum Br., at 7, 27, but does not establish that the district court's finding on this question was clearly erroneous.

continues to elect Henry Bonilla, whom the regression analyses said was not the Hispanic candidate of choice. J.S., at 134a. If anything, the voters moved from CD 23 in Webb County are now in a district (CD 28) where, the data show, Hispanic voters they *can* elect their candidate of choice. And in the 2004 election, they did just that, sending Henry Cuellar – the same popular Laredo politician who almost beat Henry Bonilla in the 2002 contest for old CD 23 –to Congress from new CD 28. *See* Election Returns Database, *supra* note 3.

GI Forum's complaint is addressed to *how* the State used its discretion to draw those six districts. To be sure, even under the Appellants' demonstration Plan 1385C, and any other alternative, some Hispanics will reside in districts that are not "performing" majority-minority districts. Yet, GI Forum urges that the State should have ensured that the particular Hispanics in old CD 23 were now drawn into an Hispanic-opportunity district. GI Forum Br., at 37-38. But a particular "§2 plaintiff has [no] right to be placed in a majority-minority district." *Shaw II*, 517 U.S., at 917 & n.9; *see id.*, at 947 (Stevens, J., dissenting) ("[S]atisfaction of the so-called *Gingles* preconditions does not entitle an individual minority voter to inclusion in a majority-minority district.").

Thus, unless GI Forum prevails on its argument that it is both possible and legally required for the State to draw seven effective Hispanic-opportunity districts, *see* Part III.D, *supra*, attacking CD 23 in isolation cannot improve Hispanic opportunity. That is because, in Plan 1374C, it is undisputed that there are already six Hispanic-opportunity districts. J.S., at 140a; *accord* GI Forum Br., at 5, 47-48. Unless GI Forum's §2 claim necessitates seven such districts – to offer *more opportunity* than does the State's plan – its claim does not sound in vote dilution. As *De Grandy* held, "a claim that single-member districts dilute minority votes . . . requires the possibility of creating *more than the existing number* of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S., at 1008 (emphasis

added). Absent the necessity of that remedy, GI Forum's complaint about Webb County has no force under §2.

Indeed, any remedy that sought to reassemble old CD 23 would likely have the opposite effect of diminishing voting opportunities for Hispanics when compared to Plan 1374C. That is because, as the district court found, South and West Texas does not have a sufficient number of Hispanics to sustain seven effective districts. If old CD 23 were drawn again, it would take roughly 100,000 largely Hispanic voters from neighboring CD 28, weakening that as an Hispanic-opportunity district. In turn, reestablishing CD 28 might require taking so much population from CD 25 as to make it impossible to draw that district as an Hispanic-opportunity district at all.

F. The Creation of an Additional Hispanic-Opportunity District, New Congressional District 25, Further Supports the District Court's Totality of the Circumstances Finding.

In addition to preserving a district that elects Congressman Henry Bonilla, Plan 1374C also created an *additional* Hispanic-opportunity district: new CD 25. This district, everyone agreed, is controlled by Hispanic voters in both primary and general elections. J.S., at 141a-42a, 146a-47a. Thus, from the perspective of the Hispanic voter, Plan 1374: (1) preserved the existing five districts that were performing as Hispanic-opportunity districts; (2) maintained CD 23 such that it will likely continue to elect the same person it has elected for more than a decade, Hispanic Republican Henry Bonilla (a representative who has a long demonstrated history of being responsive to the Hispanic community); and (3) created yet another Hispanic-opportunity district, new CD 25.

Appellants GI Forum's argument is that – in addition to creating the new Hispanic-opportunity district – CD 23 should not have been altered because, sometime in the future, it is possible that the demographics would have changed such that Congressman Bonilla would have been defeated by a candidate who enjoyed majority support from Hispanic voters (as compared to the substantial, but

less than majority, Hispanic support Bonilla has received). The district court correctly determined that the totality of the circumstances do not require such a result, J.S., at 135a-36a, and that finding is not clearly erroneous.

IV. THE STATE'S POLITICAL CHOICE ABOUT HOW TO FULFILL ITS VOTING-RIGHTS-ACT OBLIGATIONS IN SOUTH AND WEST TEXAS DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants also challenge the Texas Legislature's creation of two districts in South and West Texas along its border with Mexico, new CD 25 and new CD 23, as violating the Fourteenth Amendment's Equal Protection Clause. *See* Jackson Br., at 43-49; GI Forum Br., at 27-34.[113] These challenges ultimately must fail because, as the district court correctly determined, Appellants failed to carry their significant burden in showing that race was the predominant factor in the Legislature's districting decisions. J.S., at 151a, 165a.

To the contrary, the Legislature's districting decisions concerning new CD 25 and new CD 23 were not predominantly motivated by racial considerations; they were driven instead by political considerations. That is, in reconfiguring old CD 23 and in creating new CD 25, the Legislature made two fundamental, interconnected political choices. First, in reconfiguring old CD 23, the Legislature was concerned primarily with incumbency protection and creating a more Republican-friendly district through the removal of reliable Democratic voters who also happened to be Hispanics. Second, because of old CD 23's

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[113] The Appellants' claims are somewhat at odds. The Jackson Appellants argue that new CD 25 is a racial gerrymander because of its shape and the desire of the Texas Legislature to make a different political choice about how best to comply with §5 of the Voting Rights Act. They claim that even that limited degree of race-consciousness violates the Constitution. The GI Forum Appellants, on the other hand, do not attack new CD 25; rather, they argue that §2 of the Voting Rights Act affirmatively obligated the State to create seven, rather than six, Hispanic-opportunity districts in South and West Texas.

reconfiguration, the Legislature faced another political choice – how best to avoid retrogression and achieve compliance with §5 of the Voting Rights Act. To solve this challenge, the Legislature chose to create a new Hispanic-opportunity district – new CD 25 – which would allow Hispanics to actually elect its candidate of choice, something which the data demonstrate old CD 23 had not done. The creation of new CD 25 and new CD 23 ultimately relates to what the Court has sanctioned as the "political choice" over "whether substantive or descriptive representation is preferable." *Ashcroft*, 539 U.S., at 483.

These facts, as found by the district court, entirely resolve the Appellants' equal protection claims. The Court should therefore affirm the district court's judgment upholding new CD 23 and New CD 25.

A. Constitutional Standards and Standards of Review Governing Racial Gerrymander Claims.

Congressional redistricting is a matter primarily left to the States. *See, e.g., Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 242 (2001) (stating that "districting decision[s] . . . ordinarily fall[] within a legislature's sphere of competence"). In accomplishing this task, States have the discretion to make the political choices subject only to constraints imposed by the Constitution and Congress. *See, e.g., Miller*, 515 U.S., at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *id.*, at 915-16 ("[C]ourts . . . must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus."); *see also Cromartie II*, 532 U.S., at 242 (stating that "courts must 'exercise *extraordinary caution*'" in reviewing challenges to legislative districting plans).

Both the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act restrict state legislatures in how they may consider race in making districting decisions. But they do not eliminate race as a consideration entirely; indeed, the Voting Rights Act – and

§5 in particular – requires some degree of race consciousness to comply with its legal mandate. As this Court has recognized, state legislatures may consider race in making districting decisions, provided that they do not subordinate traditional race-neutral districting principles and make race the *predominant* motivating factor in their districting decisions. *See Miller*, 515 U.S., at 916; *see also Ashcroft*, 539 U.S., at 480-83.

Here, the district court appropriately analyzed Appellants' claims of racial gerrymandering using the predominance test:

> "States are not required to ignore race; indeed the Supreme Court has acknowledged that states will always be aware of race when they draw district lines. The factor of race or ethnicity may be considered in the process as long as it does not predominate over traditional race-neutral redistricting principles. The fact that race is given consideration . . . and the fact that majority-minority districts are intentionally created does not suffice to trigger strict scrutiny." J.S., at 161a (citing *Miller*, 515 U.S., at 916; *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*); *Bush v. Vera*, 517 U.S. 952, 962 (1996)).

As an evidentiary matter, in challenging the Legislature's districting decisions in the court below, Appellants bore the "demanding" burden of proving that race was the Legislature's predominant consideration. *Id.*, at 241; *Miller*, 515 U.S., at 928 (O'Connor, J., concurring). They were not permitted merely to assert that race was "'*a* motivation'" for the districting decisions at issue. *Cromartie II*, 532 U.S., at 241 (quoting *Bush*, 517 U.S., at 959) (emphasis in original). Rather, Appellants were required to show that a facially neutral law was "unexplainable on grounds other than race." *Id.*, at 241-42 (internal quotations omitted) (quoting *Shaw I*, 509 U.S., at 644, in turn quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). In finding that "[t]he districting decisions involved in Plan 1374C are best explained by

Texas's geography and population distribution and its Legislature's predominantly political intent," J.S., at 165a, the district court correctly determined that Appellants failed to carry their burden.

Because the District Court committed no clear error in its finding of fact that "[t]he record in this case does not show that ethnicity predominated," J.S., at 165a, and, accordingly, correctly rejected Appellants' Equal Protection claims regarding new CD 25 and new CD 23, the Court should affirm the district court's judgment.

B. The District Court Did Not Commit Clear Error in Determining That Race Was Not the legislature's Predominant Motive in Creating New CD 25.

The Jackson Appellants challenge the Legislature's decision to create new CD 25 as an unconstitutional racial gerrymander. They purportedly base their attack on both circumstantial and direct evidence that race was the Legislature's predominant motive in creating the congressional district. *See* Jackson Br., at 44-49. Each will be discussed below.

1. The district court correctly found that Appellants' circumstantial evidence does not demonstrate racial gerrymandering.

Appellants' circumstantial argument has two prongs. First, they claim that CD 25 has such a "bizarre" shape that this is proof of a predominant racial motive. Secondly, and closely related to their first argument, they point to the district's "smallest circle" score – a measure of compactness – as circumstantial evidence of a predominant racial motive. Jackson Br., at 43, 47 n.40, 48. Both of these arguments miss their mark.

a. District 25's shape is not "bizarre."

Appellants assert that, because CD 25 starts with the dense pocket of Hispanic population in McAllen on the Mexican border and runs from there "to the heavily Latino neighborhoods of Austin, in Central Texas, 300 miles

away," this creates a "bizarre" shape and indicates that the Legislature made a racially motivated choice. *Id.*, at 44 ("ethnicity is the only common thread"). They claim that CD 25's shape is "bizarre" for three principal reasons: its length, its relatively narrow shape, and the fact that "two dense pockets of Hispanic population" are 300 miles apart and connected by what they call a "rural 'land bridge.'" *Id.*, at 44-45. But Appellants' arguments ignore the district court's findings and the difficult realities of Texas geography and population distribution that affect legislative districting decisions.

As the district court found, the unique geography and population dispersion of South Texas present serious challenges to anyone attempting to make districting decisions for the area. J.S., at 154a. "The sheer size of the land, its irregular shape, and the distribution of the bulk of the population in various pockets of the State are the basics that shape the map before the redistricter even begins." J.S., at 115a. In South and West Texas especially, the "combination of geography and population distribution fixes certain characteristics of the redistricting map." J.S., at 116a. To ensure equipopulosity, "[t]he district that begins just east of El Paso County must be large and must run east from far West Texas, stretching deeply into central and South Texas. The districts that begin in far South Texas must run north in 'strip' fashion into central Texas. The district that begins in the southern tip of Texas and travels up the coast must proceed north." J.S., at 118a.

Regarding CD 25, it owes its shape directly to the geography and population dispersion of South and West Texas. Because population is concentrated heavily on the border, the only viable option is to draw the district from the border inland. And once a district moves inland, it must travel through many sparsely populated counties before reaching a more populous area where it can fill out its population. The tendency toward this shape, moreover, was even stronger here because the Legislature was working around other pre-existing districts with similar configurations. Districts 28 and 15, which previously had

been long and narrow, were split up the middle by new CD 25, which took roughly the same number of people from each of the prior districts. *See* J.S., at 218a. *Compare* J.A., at 295 (demonstrating that in Plan 1151C, CD 15 and CD 28 extend several hundred miles north from the Texas-Mexico border towards Central Texas), *with* J.A., at 296 (demonstrating that in Plan 1374C, CD 15, CD 25, and CD 28 extend, in similar fashion, north from the Texas-Mexico border towards Central Texas, and that these three districts also track the Gulf Coast of Texas). Thus, new CD 25's length is not surprising, and cannot demonstrate that racial motivations were predominant in its creation.

Moreover, what Appellants deride as "little more than a rural 'land bridge'" connecting two dense pockets of Hispanic population, Jackson Br., at 44, is, in fact, *seven whole, contiguous counties*. *See* J.A., at 296. The several intervening counties connecting Austin at the northernmost end of CD 25 and McAllen in the district's southernmost end are necessary because they are so sparsely populated. *See, e.g.*, J.A., at 298 (showing that South Texas consists of vast areas of sparse population). Appellants concede that any possible inference of racial gerrymandering based on a "long" district requires at least a showing that the "district reaches out . . . to grab a distant pocket of ethnic population, *without picking up substantial intervening Anglo population*." Jackson Br., at 46 (emphasis added). But, when District 25 reaches up from the Mexican border toward Austin, there is no "substantial intervening Anglo population" to avoid. The only split counties in CD 25 are located at the ends of the district, where the equal population requirement mandates such county splits. Therefore, the shape of CD 25, which is similar to the shapes of CD 28 and CD 15 in *both* Plan 1151C and Plan 1374C, does not raise constitutional concerns.[114]

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[114] According to Appellants, Justice Ginsburg's dissent in *Miller* "not[ed] that in Georgia's District 11, as here, the connecting links consisted of whole rural counties." Jackson Br., at 45. Presumably, Appellants are attempting to show that, because *Miller* struck down the district, the Court found it was not enough that the connecting portion

(Continued on following page)

By comparison, it is untenable for Appellants to describe CD 25's shape as "bizarre", as that term is understood in the context of districting litigation. It is nothing like the bizarre district at issue in *Shaw I*, which was variously described as resembling a "Rorschach ink-blot test" and a "bug spattered on a windshield." 509 U.S., at 635. Nor is it even remotely comparable to the bizarre "monstrosity" in *Miller*. *See* 515 U.S., at 909.

Indeed, as seems obligatory in racial-gerrymandering cases, *see, e.g.*, *Potter v. Washington County, Fla.*, 653 F.Supp. 121, 130 (N.D. Fla. 1986) (describing one district as "dragon shaped"), Appellants have suggested a pejorative nickname for the district they challenge: a "bacon-strip" district. Jackson Br., at 45. But CD 25 has none of the bizarre twists and turns of a dragon; indeed,

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consisted of whole counties. But this mischaracterizes Justice Ginsburg's statement. She actually wrote, in supporting the constitutionality of the district: "Nor does the Eleventh District disrespect the boundaries of political subdivisions. Of the 22 counties in the district, 14 are intact and *8 are divided*." *Miller*, 515 U.S., at 941 (Ginsburg, J., dissenting) (emphasis added). Thus, even if Appellants' premise that a land bridge of contiguous counties was struck down in *Miller* were true, their suggestion that the district drawn by the Texas Legislature – in which 2 of 11 counties are divided – should be struck down *because* a district in which 8 of 14 districts were divided was struck down, should not be followed by the Court. But Appellants' premise is inaccurate. In *Miller*, the "land bridges" themselves – note that there were multiple "land bridges" in the district struck down by *Miller*, 515 U.S., at 908 – contained two *split* counties, *see id.*, at 928; *see also* Appellees' Br., at 7 n.7, *Miller v. Johnson* (No. 94-631), rather than undivided counties. Additionally, *Miller* points out that the challenged district included "*four*, discrete widely spaced urban centers," *Miller*, 515 U.S., at 908 (emphasis added), rather than the two in CD 25 drawn by the Texas Legislature. In all respects, the shape of CD 25 complies with traditional districting principles far better than the district struck down in *Miller*. Indeed, by force of geography CD 25 had to extend to more than one population center just to get sufficient population for a congressional district.

on some level, "bacon-strip" is merely colorful phrasing for "rectangle."[115]

The district court's finding that CD 25 did not have an unconstitutionally bizarre shape had substantial evidentiary support, was not clearly erroneous, and should therefore be affirmed.

b. District 25's compactness scores reveal an absence of a predominant racial motive.

Other than simply challenging CD 25's shape as being bizarre, Appellants also assert that compactness measures indicate that racial concerns predominated in the Legislature's drawing of CD 25. *See* Jackson Br., at 46-48. In considering compactness as a measure of bizarreness and as possible further circumstantial proof of predominant racial motive, the district court looked to the nonpartisan, bicameral Texas Legislative that CD 25 was not the result of a racial gerrymander, because these scores did not "approach those of districts so bizarrely and irregularly drawn that courts interpret their creation as 'an effort to segregate the races for purposes of voting, without regard for traditional districting principles.'" J.S., at 153a (citing *Shaw I*, 509 U.S., at 642; *Hunt v. Cromartie*, 526 U.S. 541, 548 n.3 (1999) (*Cromartie I*)).

These scores were derived from two different measures of compactness – "smallest-circle" and "perimeter-to-area." *Id.*, at 153a-55a. Appellants focus exclusively on the smallest-circle measure and fail to address the perimeter-to-area measure in their brief, which the

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[115] The southern end of CD 25 is somewhat jagged, not because of the map-drawers, but because of geography: it follows the twists and turns of the Rio Grande River. Beyond that, the only irregularities are at the northern and southern tips, both necessary to achieve the precise population equality required by law. In between, the sides of the rectangle merely trace the longstanding historical boundaries of seven contiguous counties (which, necessarily, must be joined with some more populous areas to form a complete congressional district).

district court also considered and which provides strong evidence that race was not the predominant motive in the Legislature's districting decision.

The smallest-circle score for CD 25 in Plan 1374C is 8.5. *Id.*, at 153a. Appellants suggest that this score is sufficient to subject the district to strict scrutiny and to demonstrate race as the predominant legislative motive. Jackson Br., at 46-48, 47 n.40 (stating that CD 25 has a worse smallest circle score than any of the 32 districts in Plan 1151C).[116] Although this score is moderately high, it still is less than half the 21.7 score achieved by North Carolina's District 12, which was struck down in *Shaw II*. And CD 25's smallest-circle score is below the score (8.6) that the reconfigured North Carolina district achieved, which the Court deemed to be constitutional. *See Cromartie v. Hunt*, 133 F.Supp.2d 407, 415 (E.D.N.C. 2000), *rev'd*, *Easley v. Cromartie*, 532 U.S. 234 (2001).

Moreover, as the district court correctly observed, "the issue is whether a district's shape, as measured by compactness scores, provides evidence of a constitutional violation *when considered in relation to the geography and population distribution in the relevant part of the State.*" J.S., at 153a (emphasis added) (citing *Miller*, 515 U.S., at 917). As already discussed above, geography and population distribution played a decisive role in shaping CD 25's configuration. Accordingly, the district court correctly found that "[t]he smallest circle measure of compactness for the southern and western districts in Plan 1374C, examined in relation to the geography and population, reflect the sheer size and population distribution of the area, rather than a calculated stretch to find voters of a particular ethnic makeup." J.S., at 154a-55a.

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[116] Despite Appellants' assertion, just because a particular district has a higher score than other districts in the map, this fact, by itself, does not mean that the district is unconstitutional. Every districting map, regardless of the considerations that went into the districting decisions, will have one district with the lowest scores; that fact does not render the district unconstitutional.

Appellants further assert that "[w]hen a mapmaker drawing a minority district reaches out a long distance to grab a distant pocket of ethnic population, *without picking up substantial intervening Anglo population, the district's 'Smallest Circle' score suffers.*" Jackson Br., at 46 (emphasis added). But, as the district court pointed out, "population densities in Congressional Districts 28, 25, and 15, *both Anglo and Hispanic*, are highest in the Valley and in Central Texas, separated by relatively sparsely populated areas." J.S., at 154a (emphasis added). And there was no intervening Anglo population to exclude. Thus, it was not an attempt to exclude one racial group, nor an attempt to include another racial group, that led to CD 25's length and smallest-circle score – it was the lack of sufficient population in the counties between the border and Central Texas.

In addition to the smallest-circle measure of compactness, the district court also considered CD 25's perimeter-to-area score as a further measure of compactness. As the district court noted, "[p]erimeter to area calculations are useful for determining whether map drawers used convoluted lines to bring members of one racial group into a district while excluding other members of another racial group." J.S., at 155a; *see also* Tr., 12/19/03 AM, at 7:24-25 to 8:1-2 (Testimony of Todd Giberson) ("[A] perimeter-to-area ratio . . . measures basically how convoluted a given boundary is that surrounds a given area, how convolute[d] that area is."); *id.*, at 35:1-4 (agreeing that "[r]oughly speaking, the perimeter-to-area measure looks at how jagged or irregular or convoluted the District's boundary is"). Indeed, perimeter-to-area is probably a more useful measure of compactness than is the smallest-circle measure because it is "a better measure of what the Court doesn't like," that is, "[t]he perimeter score . . . shows how convoluted [and] picked apart the boundaries are on race or ethnicity." *Id.*, at 76:22-25 to 77:1-4, 13-16, 21-24.

Here, the district's perimeter-to-area score is safely within normal limits, coming in at 9.6. J.S., at 153a. Appellants do not dispute that, for purposes of discerning racial motives, a 9.6 perimeter-to-area score is unremarkable. In fact, their own expert testified that, by itself, this

number would not be problematic. Tr., 12/15/03 AM, at 80:11-14 (Appellants' expert stating "it's not unusual to see [a perimeter-to-area score] up *in the hundreds*" (emphasis added)). By contrast, Texas's then-Districts 18, 29, and 30 which were struck down in *Bush v. Vera*, 517 U.S. 952 (1996), had perimeter-to-area scores of 106.3, 144.0, and 69.0, respectively. *See* Tr. 12/19 AM 12:14-25 & 13:1-25.

Based on the testimony, the district court accurately found that CD 25's perimeter-to-area score did "not reflect the predominance of ethnicity in drawing district lines," and did "not reveal lines precisely drawn to include Hispanics and exclude Anglo voters, to ensure Hispanic citizen voting age majority districts." J.S., at 155a. Rather, the court found that the score reflected "lines drawn to include enough voters to meet the one-man-one-vote constitutional requirement." *Id.* This conclusion was not clearly erroneous.

2. The district court correctly found that Appellants' purported direct evidence did not support a finding of racial gerrymandering.

Appellants further assert that two bits of direct testimony supports their racial gerrymandering claim. Jackson Br., at 48. They claim that direct testimony from two of the State's witnesses, Representative Phil King and expert Todd Giberson, established "that the intent in creating new District 25 was racial, not political." *Id.* This assertion is false.

For starters, Appellants take Representative King's testimony out of context. *Id.* (citing Tr., 12/18/03 PM, at 152-42). In fact, the Representative's testimony directly supports the district court's finding that politics, not race, was the Legislature's predominant motive in drawing CD 25. Representative King flatly stated that the Legislature's "objective was always how do we get more Republican seats and stay away from Districts that would create issues for DOJ." Tr., 12/18/03 PM, at 152:21-24. The principal motivating force behind creating CD 25, according to Representative King, was the Legislature's twin

aims of protecting the Republican incumbent in CD 23, Congressman Bonilla, and avoiding retrogression under §5 by creating CD 25 as an Hispanic-majority district. *Id.*, at 151:2-25 to 152:1-11. Moreover, the configuration of CD 25 also took into account how to make a Republican district out of CD 10. *Id.*, at 152:13-18. To accomplish this goal, Democrats were moved out of CD 10 and into CD 25. *Id.* This is obviously a political objective.

Contrary to Appellants' assertions, this testimony fully supports the district court's finding that Representative King "provided credible testimony that the numerous decisions embodied in the location of each district line [in South and West Texas] combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S., at 160a-61a. That finding was not clearly erroneous.

In addition to the testimony of Representative King, Appellants point to the testimony of the State's geographic expert, Todd Giberson, as evidence of the Legislature's predominant racial motive in creating CD 25. Jackson Br., at 48. Giberson is a "redistricting analyst and a . . . geographic information systems programmer for the [Texas] Attorney General's office." Tr., 12/19/03 AM, at 6:10-12. Appellants assert that Giberson's testimony reveals that, in creating CD 25, it was "more important" for the Legislature "to create an Hispanic district than a Democratic district." Jackson Br., at 48 (citing Tr., 12/19/03 AM, at 47).[117] Giberson did indeed make that statement. But, again, as with Representative King's testimony, context is key, and Appellants fail to provide it.

As a geographer, Giberson testified concerning compactness scores and their relative distribution compared to those of other districts. His subjective opinion – "I *believe* that the . . . that they were trying to create an

[117] Appellants incorrectly reference page 47 from the transcript. The correct page reference for the Giberson quote is page 52.

Hispanic District," Tr., 12/19/03 AM, at 54:4-5 (emphasis added) – provided no basis for assessing the *Legislature's* intent. Indeed, a few questions later in his testimony, Giberson was asked:

> "Q. So the map-makers were trying to create a new Hispanic District because they wanted the plan as a whole to have one additional Hispanic District and one fewer non-Hispanic Districts?" *Id.*, at 54:17-20.

This question drew an objection:

> I think now, Your Honor, we're way outside the bounds of direct. He looked at compactness scores. He's not a member of the Legislature, and I object on relevancy and also on the hearsay. *Id.*, at 54:21-25.

The district court agreed and sustained the objection. *Id.*, at 54:12-13.

Thus, the district court gave Giberson's subjective testimony about legislative intent no weight, which was entirely appropriate.

3. There was ample evidentiary support for the district court's finding that politics, not race, was the legislature's predominant motivation.

The district court gave Appellants' racial-gerrymandering challenge to new CD 25 full consideration. After hearing all the evidence and assessing the witnesses' credibility, the court concluded that "[t]he evidence show[ed] that the [district] lines did not make twists, turns, or jumps that can only be explained as efforts to include Hispanics or exclude Anglos, or vice-versa." J.S., at 162a. Instead, the court found plentiful evidence that "many of the lines were drawn for such reasons as balancing population, keeping certain cities or areas intact in a district, and satisfying requests from state or federal legislators to keep certain areas together, or place universities in different districts." J.S., at 162a. Ultimately, the District Court concluded that Appellants did not meet "their significant burden of demonstrating racial gerrymandering." J.S., at 165a. Because the trial

court's findings with respect to the constitutionality of CD 25 are not clearly erroneous, the Court should affirm.

C. The District Court Correctly Found That District 23 Was Created as a Result of Politically Motivated Decisions.

The GI Forum Appellants assert that the Legislature's creation of new CD 23 violated the Equal Protection Clause of the Fourteenth Amendment. *See* GI Forum Br., at 27-34. They argue that the Legislature exhibited unconstitutional discriminatory intent in drawing CD 23 because it intentionally diluted Hispanic voting strength. The test for unconstitutional vote dilution, they claim, is the same as the test for intentional vote dilution under §2 of the Voting Rights Act; therefore, they claim that the §2 test may be used here to demonstrate an equal protection violation. *See id.*, at 28.

But GI Forum's argument is founded upon an incorrect view of §2. Proper §2 analysis focuses on results, not intent.[118] The district court, however, did not follow GI Forum's view and, instead, analyzed their claim using the appropriate §2 standard, finding that the Legislature's actions in drawing CD 23 comported with all the dictates of §2.

Appellants erroneously base their claims of unconstitutional intent on *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See* GI Forum Br., at 29. But, even under *Arlington Heights*, plaintiffs must prove that an "invidious discriminatory purpose was a motivating factor," 429 U.S., at 266; mere

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[118] The Court has held that, after the 1982 amendments, §2 "focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate §2; where such an effect has not been demonstrated, §2 *simply does not speak to the matter*." *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (emphasis added). *Accord* S. Rep. No. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214 (stating that a §2 inquiry into intent "asks the wrong question").

awareness of race does not suffice. *Washington v. Davis*, 426 U.S. 229, 240-42 (1976); *see also Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (stating that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part *'because of,' not merely 'in spite of,'* its adverse effects upon an identifiable group." (emphasis added)) (citation omitted). As the district court noted, "the Supreme Court has acknowledged that states will always be aware of race when they draw district lines." J.S., at 151a (citing *Miller*, 515 U.S., at 916).

In *Arlington Heights*, the Court held that the plaintiffs there did not meet the standard of proving invidious intent rather than mere awareness. 429 U.S., at 270-71. Likewise, the district court here found that there had been no racial discrimination in the drawing of District 23:

> "[C]redible testimony from the State's witnesses demonstrated that factors at the heart of traditional districting criteria, including political goals, predominately influenced the numerous decisions embodied in the location of each district line." J.S., at 158a.

Appellants' argument as to the State's contrary intent, relies upon the testimony of a non-defendant who indicated – at most – consciousness of race on the part of map drawers. *See* GI Forum Br., at 30-31. But, as in *Arlington Heights*, 429 U.S., at 269-70, the district court here found that there was "credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S., at 160a-61a. That finding was adequately supported by sufficient evidence and is not clearly erroneous.

Nor could Appellants prevail under the modern constitutional standard, which the district court properly applied in assessing intent. *See* J.S., at 150a-51a (citing *Cromartie*

II, 532 U.S. 234; *Bush v. Vera*, 517 U.S. 952; *Shaw II*, 517 U.S. 899; *Miller v. Johnson*, 515 U.S. 900; *Shaw I*, 509 U.S. 630). The district court's analysis properly placed the burden of proof on the plaintiffs. *See* J.S., at 151a (citing *Vera*, 517 U.S., at 958-59; *Miller*, 515 U.S., at 916).

On the full record, the district court properly found that CD 23's new lines were most logically and credibly explained as a political division:

> "The State presented undisputed evidence that the Legislature changed the lines of Congressional District 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede that there is a strong correlation between Hispanic and Democratic voters." J.S., at 156a.[119]

The district court also properly rejected the conclusions offered by Appellants' experts because they failed to account for the effect of politics. *See* J.S., at 156a n.201. The Court's equal protection jurisprudence recognizes that sometimes race and party are strongly correlated, and that politically motivated district lines do not in themselves implicate racial intent under the Constitution. "[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be Black Democrats and even if the State were

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[119] Appellants refer to a comments by two state legislators to suggest that there was a "profoundly racial motive": to "reduce the Latino population of Congressional District 23 so that it could not elect the Latino-preferred candidate, but ensure that the district was nominally Latino so that Mr. Bonilla could still claim to be elected from a Latino-majority district." GI Forum Br., at 11, 10-12. But the District Court weighed all the evidence and explained the Legislature's "dual goals" with respect to District 23: "increasing Republican seats in general," and "protecting Bonilla's incumbency in particular." J.S., at 135a. Both goals were political, rather than racial. Given the demographics of South and West Texas, there was, at most, awareness of race.

conscious of that fact." *Cromartie I*, 526 U.S., at 551-52. *Cromartie I* controls Appellants' constitutional claims.

Here, the district court expressly found that politics, not race, drove the line-drawing. The decision to split Webb County "affected voters whose ethnicity and political partisanship voting achieved strong correlation." J.S., at 156a. The district court rejected any inference that this county split had any predominant racial motivation: "[T]he State provided credible race-neutral explanations for Plan 1374C's county cuts. . . . The legislative motivation for the division of Webb County . . . was political." *Id.*, at 158a. As the district court found, the cuts through Webb County "in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance." *Id.*, at 159a. They were not based on race.

Nor is there any viable comparison between this case and *Bush v. Vera*, where the State used block-level data more than necessary, from which the Court inferred that information available at that level (population and race) was more significant than information not broken down at such a fine level of geography (election precinct results). *See* 517 U.S., at 961-62. Here, "the data the Legislature used in the districting process does not support a claim of unwarranted reliance on ethnicity to make the line-drawing decisions." J.S., at 164a. Unlike *Vera*, "the State presented undisputed testimony that the map drawers examined race at the block level in South and West Texas region on only a few occasions in order to avoid splitting minority communities." J.S., at 164a-65a.

The District Court was able to evaluate the short testimonial snippets relied upon by Appellants in their full context, concluding that

> "[t]he record does not present evidence of statements by legislators or staff supporting the claim that ethnicity predominated in the redistricting process. To the contrary, the emails, statements, and other communications from those involved in the process reveal that politics predominated." J.S., at 64a.

On the whole, the District Court found credible the State's explanation of "the numerous decisions embodied in the location of each district line" as reflecting "local political decisions that are the most traditional of districting criteria." J.S., at 158a. Because this finding is supported by the record, the district court committed no clear error.

V. EVEN IF THE COURT WERE TO FIND SOME LEGAL INFIRMITY, REINSTATING PLAN 1151C WOULD NOT BE AN APPROPRIATE REMEDY.

Unless the Court were to rule that a State may *never* replace a court-drawn districting plan with a plan of its own, a reversal of any part of the district court's judgment should at most include a remand. Consistent with the limited, remedial role of federal courts, the State of Texas should be afforded a full opportunity to remedy any deficiency the Court might find in Plan 1374C and to implement the State's policy preferences consistent with the Court's opinion. *Cf. Upham*, 456 U.S., at 44 ("[T]he District Court's plan is only an interim plan and is subject to replacement by the legislature.").

Three Appellants urge that Plan 1374C be set aside in its entirety, and that Plan 1151C be reinstated. *See* Jackson Br., at 50 (requesting a remand for the district court to "immediately reinstate congressional redistricting Plan 1151C"); Travis County Br., at 30 (requesting the Court "order reinstatement of Plan 1151C"); LULAC Br., at 37 (requesting the Court to "enjoin any further use of [Plan 1374C]"). The fourth Appellant, GI Forum, wishing to preserve the new Hispanic-opportunity district created by the Legislature, does not urge reinstatement of Plan 1151C; remand to draw yet one more Hispanic-opportunity district. GI Forum Br., at 50.

On the law and the facts, the Court should affirm the judgment of the district court, but, if it were to reverse any aspect of the judgment, in no event would Plan 1151C – the core policy preferences of which have been squarely rejected by the Texas Legislature – be an appropriate remedy. *Upham*, 456 U.S., at 43 ("[T]he District Court was

not free . . . to disregard the political program of the Texas State Legislature.").

CONCLUSION

The Court should affirm the judgment of the district court.

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In The

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RICK PERRY, *et al.*,

Appellees.

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REPLY BRIEF OF APPELLEE FRENCHIE HENDERSON IN SUPPORT OF APPELLANTS

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REPLY BRIEF OF APPELLEE FRENCHIE HENDERSON IN SUPPORT OF APPELLANTS

In the Present Case, No Constitutional Principle of Federalism Is Implicated by Permitting a Court to "Establish" Permanent Congressional Districts Until the Return of a Subsequent Federal Census.

In its Brief the State of Texas has essentially asserted an unfettered "constitutional right" to have its legislature supplant the valid congressional districting plan judicially established by the District Court in *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex.) (unpublished), *aff'd memo.*, 536 U.S. 919 (2002). Contrary to the State's contention, this Court has never directly addressed whether Article I, Section 4 (hereinafter the "Elections Clause") delegates that superseding right to State legislatures; and, for the reasons stated below, the Court should reject the State Appellees's constitutional argument.[1]

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[1] Of the seven Supreme Court decisions cited by the State of Texas and the District Court for the proposition that State legislatures constitutionally possess such a superseding power to alter valid congressional districts, see *State Appellees' Brief*, 52-53; *Session v. Perry*, 298 F.Supp.2d 451, 460 n. 14 (E.D. Tex. 2004); four did not involve congressional redistricting. See *Burns v. Richardson*, 384 U.S. 73 (1966) (State Senate districts); *Connor v. Finch*, 431 U.S. 407 (1977) (State House and Senate districts); *Wise v. Lipscomb*, 437 U.S. 535 (1978) (City Council districts); *White v. Regester*, 422 U.S. 935 (1975) (State House districts). In the remaining three decisions cited by the State on this point, in one a valid statewide congressional districting plan had not yet been established, judicially or otherwise, *Upham v. Seamon*, 456 U.S. 37 (1982); in another, no "final judgment" had been entered, *White v. Weiser*, 412 U.S. 783, 789 (1973); and in the third, *Branch v. Smith*, 538 U.S. 254 (2003) (involving yet another "interim" plan), the Court merely stated that "the District Court's alternative holding" (which was vacated by the Court) would not prevent Mississippi

(Continued on following page)

No constitutional principle of federalism is implicated by permitting Courts, at the direction of Congress, to "establish" permanent congressional districts until the return of a subsequent federal census, when, as here, a State legislature has wholly failed (deliberately) to timely enact new districts after a federal census and apportionment, and before the ensuing congressional election thereafter. As discussed in greater detail in Appellee Henderson's jurisdictional statement,[2] the First Congress of the United States considered and *rejected* a proposed constitutional amendment (adopted at the New York ratification convention) that would have "broadened" the power of State legislatures under the Elections Clause to include *precisely* the power to supersede federal regulations now claimed by the State of Texas. This rejected amendment was proposed by those who, like the State of Texas, "apprehend[ed] that the [Elections] clause might be so construed as to deprive the States of an essential right, which, in the true design of the constitution was to be reserved to them."[3] It's proponents sought, like the State of Texas seeks here, to ensure that federal election regulations implemented *via* the powers of Congress, and enacted as the result of a State legislature's default, would remain in effect "*only until the legislature of such state shall make provision in the premises.*"[4] The fact that a Select Committee of the First Congress voted not to report

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from again "seeking to administer" a "redistricting plan adopted by the Chancery Court." *Id.*, 538 U.S. at 265-266.

[2] *Henderson v. Perry*, No. 04-10649, pages 34-37.

[3] 2 *Elliot, The Debates of the Several State Conventions on the Adoption of the Federal Constitution*, 325-326 (hereinafter "*Elliot's Debates*").

[4] 1 *Elliot's Debates*, 329-330.

this amendment for further consideration[5] provides "inferentially meaningful" evidence of the Framers's intent;[6] and, being a "Decision of 1789," that decision constitutes "contemporaneous and weighty evidence of the Constitution's meaning."[7]

The Framers also understood the maxim *qui facit per alium facit per se*,[8] as did the 47th Congress when it was first to consider delegating its own Elections Clause power to other "constituted agencies" in order to compel dilatory or intransigent State legislatures to *timely* comply with a single member districting requirement.[9] The decision of the 90th Congress, embodied in present Title II U.S.C. Section 2c (hereinafter "Section 2c"), to delegate its own redistricting power under the Elections Clause to the courts – State and Federal, in order to compel dilatory or intransigent States to *timely* comply with the single member districting requirement (whether intended or not to foreclose "re-redistricting" by State legislatures before a subsequent federal census), simply does not, in any constitutional

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[5] 1 *Annals of Congress*, 786-788 (Aug. 18, 1789).

[6] *Cf.*, *Mistretta v. United States*, 488 U.S. 361, 398 (1989) ("we find it at least inferentially meaningful that at the Constitutional Convention . . . [prohibitions] were proposed, but did not reach the floor of the Convention for a vote.").

[7] *Bowsher v. Synar*, 478 U.S. 714, 723 (1986). A similar but more limited amendment to the Elections Clause was debated and rejected three days later by the First Congress. 1 *Annals of Congress*, 797-802 (Aug. 21, 1789).

[8] 1 *The Records of the Federal Convention of 1787*, 234 (Farrand ed. 1911) ("What a man does by another, he does by himself.") (Statement of Delegate Roger Sherman, describing this "maxim") (June 13, 1787).

[9] 13 *Cong.Rec.*, 1228 (1882) ("Whatever this Congress does by its constituted agent it does by itself.") (Statement of Rep. Thompson of Kentucky when proposing statutory predecessor to current Section 2c).

sense, infringe on any "States' rights." The District Court in *Balderas v. Texas*, when establishing congressional districts in 2001, was functioning as an agent of Congress pursuant to a *congressional delegation of authority* provided by federal statute and expressly permitted by the Elections Clause.[10]

In short, the State of Texas's claim to a "constitutional right" to pursue congressional redistricting at will *after* valid districts have been judicially "established" *via* Congressional authority pursuant to Section 2c, is not of constitutional dimension. It is instead either: 1) an argument that the State's newly enacted districts do not "conflict" (territorially) with those "established" by the *Balderas* court (which would "not depend on discerning the intent behind [Section 2c]");[11] or, 2) an argument that Congress, when enacting Section 2c, intended for State legislatures to retain such residual "re-redistricting"

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[10] As noted by this Court in *Branch v. Smith*, prior to enactment of Section 2c, and in light of Title II, U.S.C. Section 2a (c), a plaintiff had no legal right to compel, and courts held no "equitable" power to decree, that a State be districted for congressional elections. *Id.*, 538 U.S. at 269, citing *Park v. Faubus*, 238 F.Supp. 62, 66 (E.D. Ark. 1965). Because Section 2c involves *a congressional delegation of power* that conveys a "derivative right [to] the judiciary," 113 *Cong.Rec.* 31, 719 (Nov. 8, 1967) (statement of Sen. Baker on adoption of Section 2c), its authorization of congressional redistricting by courts, as opposed to State legislatures, is not "conspicuously" devoid of "participation in the process by a body representing the people." *Colorado General Assembly v. Salazar*, 541 U.S. 1093, 124 S.Ct. 2228, 2230 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, J.J., dissenting from denial of certiorari).

[11] *Foster v. Love*, 522 U.S. 67, 73 (1997); and *id.*, at 69 ("regulations made by Congress are paramount" when a "conflict" exists).

power wholly without regard for intervening population shifts or growth.[12]

Far from "preserv[ing] the relative roles of Congress and the states under the Elections Clause";[13] the District Court's explicit acceptance of the State of Texas's constitutional "States' rights" contention[14] unconstitutionally "broadens" the power delegated to State legislatures. Under the Elections Clause, valid federal election regulations do not yield, and cannot be made to simply evaporate, whenever a State legislature belatedly decides to enter an appearance.

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[12] The legislative history of Section 2c clearly demonstrates a contrary congressional intent. See *Henderson v. Perry*, No. 04-10649, *juris. stat.*, at pages 27-30.

[13] *Session v. Perry*, 298 F.Supp.2d at 465.

[14] *Id.*, 298 F.Supp.2d at 464 n. 35 (requiring "clear" textual evidence of Framers's intent to "preempt" superseding power possessed by States *before* ratification).

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Appellees.

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REPLY BRIEF FOR TRAVIS COUNTY APPELLANTS

I. The state's opportunistic re-jiggering of congressional district lines, while under no legal compulsion to act, was not in furtherance of a "reasonably conceived plan" for periodic redistricting that *Reynolds v. Sims* requires in order for the state to be afforded the safe harbor of the decennial census under the equal population rule.

The state insists that keeping two sets of redistricting books is a perfectly legitimate practice in constitutional accounting. One set of books is for the politicians. It reflects the contemporary demographic realities indicated by recent election results and voting trends, informed by detailed political insights into current population developments. The other set of books is for the courts, brought off the shelf when the constitutional auditors arrive. This set of books is known to paint an artificial picture of demographic reality, but, since it tallies correctly down to the penny, the state winks at the auditors, seeking momentary indulgence before the second set of books is put back on the shelf to gather dust until the next audit.

There is no doubt that Texas takes precisely this approach in defense of its brash and unique voluntary redistricting endeavor in 2003. It does assay a meek suggestion that trial evidence shows no more than legislative attention to contemporary "political shifts" instead of to contemporary population realities. State Br. at 65 (where state can only bring itself to assert that "bulk" of record evidence is about attention to current politics, not current population). Even this carefully hedged suggestion

is off-base. To the practiced political eye – and the legislative proponents of Plan 1374C had near-perfect vision[1] – the most recent election results and the voting patterns underlying them are strong indicia of demographic shifts, particularly in this era where voters' party loyalties are increasingly entrenched. *See* G. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 13-16 (2003) (increased predictability of partisan voting patterns).

Moreover, as recounted in detail in our opening brief, Travis County Appellants Br. at 6-9, the record contains ample evidence of attention to actual contemporary patterns of shifting populations as the legislature devised Plan 1374C. The state admits that there is testimony about population, though it tries to diminish its force by tossing it off as "snippets of testimony." State Br. at 65. "Snippets" or not, the record plainly shows acute political attention to current demographic patterns in drawing Plan 1374C's lines.[2] All the while, the state concedes that it made no effort to determine current populations for constitutional purposes, but instead relied solely on the 2000 decennial census, Stip. 85, disregarding the huge and uneven population surges of the interceding three years, Travis County/City of Austin Exh. 1.

In implicit tribute, the state ignores altogether the argument that *Reynolds v. Sims*, 377 U.S. 533 (1964), presages the core rationale for dispensing with the legal

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[1] The 2004 election results proved that Plan 1374C hit its target. Only Congressional District 17 failed to pan out, when Congressman Chet Edwards held his seat in 2002.

[2] This awareness was brought to bear with particular force in drawing Districts 4, 12, 23, and 30.

fiction of inter-census population stability in the circumstances attending Plan 1374C's passage. As we argued in the opening brief, Travis County Appellants Br. at 14, 20-21, and 22, the Court offered the states protection from constant exposure to constitutional challenges that the vicissitudes of population have rendered legislative redistricting violative of the equal population rule. In recognition of the "need for stability and continuity" in legislative configurations, the Court absolved states from "daily, monthly, annual or biennial" redistricting to comply with the equal population rule as population disequilibrium set in. 377 U.S. at 583. But, there was a catch. This absolution comes only if there is a "reasonably conceived plan for period readjustment" of district lines. *Id.*[3]

Texas offers nothing in its brief to suggest that its historically unique "readjustment" of congressional lines in 2003 was the product of a "reasonably conceived plan"

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[3] The *Reynolds v. Sims* principle underlying the constitutional challenge here belies the state's assertion that the claim has "little to do with traditional one-person, one-vote claims." State Br. at 57 n.75. True, the equal population issue has not arisen in precisely this way before, but, still truer, this kind of redistricting has not been tried before either. In a sense, Texas's unprecedented effort returns the one person, one vote rule to its roots as a meaningful check on official actions by elected officials that tend to induce rigor mortis in the democratic institution that is supposed to be the most answerable to the electorate. Respectable commentators have criticized the origins of the equal population rule, leveling the charge that one person, one vote freed legislative line-drawers to "render[ ] elections less a reflection of popular opinion than of legislative craftsmanship." M. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. JOURNAL OF LAW AND PUBLIC POLICY 103, 103-04 (2000). Robust application of the one person, one vote rule in this case, though, reaches and corrects the very problem such comments understandably but mistakenly assume the rule furthers. Things sometimes come full circle; this is one of those times.

for adjusting lines for Texas congressional seats. The structure of the Texas Constitution, in fact, suggests that the 2003 effort contravened the state constitutional plan for redistricting. While the state constitution does not advert to congressional redistricting at all, much less to timing matters, it does speak directly to the redistricting of the state House and Senate. Article III, Section 28, of the Texas Constitution establishes a judicially enforceable mechanism that compels redistricting of those seats decennially, between issuance of the census and the first round of elections afterwards. *See Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (Tex. 1971). This arrangement does not *compel* congressional redistricting to follow the same pattern, but it suggests a broader state interest in linking the periodic statewide[4] redrawing of political lines to issuance of the decennial census.

Even setting aside the hints provided by Article III, Section 28, the state in 2003 was not operating under any "reasonably conceived plan" for periodic readjustment of its congressional lines. It was responding to nothing more than the sudden political opportunity offered by a unique confluence of events: the historic ascension by the Texas Republican Party to controlling political power in the legislative and executive branches of state government; a political decision to dispense with the traditional super-majority two-thirds rule in the state Senate for congressional redistricting; sophisticated computer software to aid

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[4] Historically, curative redistricting in response to judicial invalidations has not been statewide. They are pinpointed, localized efforts in response either to a specific legal fault determined by the courts or to minor, technical political concerns. The 2003 redistricting, of course, was neither curative nor localized.

rapid, carefully calibrated line-drawing; and unparalleled intrusion into the process by national congressional figures.

All of this does not add up to compliance with the ground rules that *Reynolds v. Sims* laid down for states to cloak themselves with the protective fiction of inter-census population stability. Unless mere political opportunity fits the bill, the state plainly was not operating under a "reasonably conceived plan" for periodic adjustment of congressional lines. It certainly has not suggested one in its briefing to this Court.

Lacking such a plan, the rationale of *Reynolds v. Sims* for protecting the state in this instance from responding to the constitutional command of one person, one vote as it changed its congressional lines disappears. Once the state uncoupled congressional redistricting from issuance of the decennial census, in abandonment of the only apparent rational plan for periodic redistricting (that is, once a decade in the absence of judicial invalidation), it lost the ability to use the census as a safe harbor.[5]

Ultimately, the state's "safe harbor" defense to the equal population challenge rests on an accusation of empty formalism. In step with the two-member majority in the district court decision on remand, it derides the equal population rule urged here, claiming it would result in Plan 1374C's replacement with Plan 1151C, with no

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[5] The Constitution does not *require* states to use stale census numbers. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (state legislative case, explaining that the Equal Protection Clause "does not require the States to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured").

improvement in population equality. State Br. at 62. It is the state's position, though, that rests on formalistic rules.

The state seeks a rule that lets it rely on numbers it knows are wrong to satisfy a fundamental constitutional command. Speaking practically, the state's own chief Senate line-drawer called this "silly," but the state nonetheless insists that satisfaction of the equal population rule can be an utterly empty gesture, of only formalistic significance. Then, in further defense of the safe harbor rule it seeks, the state posits that "[t]here is simply no difference – in terms of *population equality* – between two maps based on when they were drawn." City Br. at 62. This statement lacks any factual basis whatever in the record. By its own voluntary undertaking, and its indifference to contemporary population realities, the state has created a factual vacuum about comparative compliance with equal population rules. Again, in a factually empty gesture of only rhetorical significance, the party with the constitutional obligation of meeting the requirement of Article I, Section 2, defends itself by asking the Court to hazard a guess that the state plan currently is no worse than the court-devised plan.

The Court should re-invigorate the one person, one vote rule, investing it with a practical application and bite that both critics and defenders claim have been lost over time. The state's invitation to reduce it to a mere formality should be rebuffed.

Two of the leading opinions on the equal population doctrine reveal on close reading a principle that tends to be overlooked. In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Court explains that the state bears the burden of justifying variations among the districts and that the

"as nearly as practicable standard" rejects the idea of fixed numerical standards. *Id.* at 530-31. Then, in *Karcher v. Daggett*, 462 U.S. 725 (1982), the Court explains that it is not establishing an acceptable *de minimis* level of population differences for congressional districts because doing so would tend to create a floor for legislative efforts at equality. *Id.* at 731.

In short, the Court has rejected *per se* rules which excuse population variances. *See Karcher*, 462 U.S. at 731. Driving this rejection is the understanding that *per se* rules would provide politically knowledgeable legislators an opportunity to operate under the *per se* radar screen to subtly undermine the fundamental equality principle. This principle explains the outcome in the district court case that this Court summarily affirmed in *Cox v. Larios*, 542 U.S. 947 (2004), where the 10% population variation rule that had been treated as a "rule of thumb" was held *not* to be a *per se* rule of equality. Fundamentally in this case, Texas is inviting the Court to adopt a *per se* rule: that the decennial census is *always* sufficient to satisfy the equal population principle. This is contrary to what the Court has done throughout the modern era of redistricting jurisprudence, and the state's invitation should be declined.

II. Given the availability to the state of the option of a special statewide census under 13 U.S.C. § 196, it is clear that the equal population rule sought here is not a covert attempt to rigidify the Constitution and establish a *per se* rule against voluntary mid-cycle redistricting.

Seeking to diminish the equal population rule sought by the Travis County Appellants into an insignificant subcategory of the broader mid-decade redistricting issues

raised by others, the state characterizes the argument as one about timing and the authority of the legislature, designed to block mid-cycle redistricting efforts. State Br. at 57 n.75, 58, 61.[6] This is a mis-characterization.

The state had, and has, an option available to it that permits the development of official census data that can be used for statewide redistricting. Under 13 U.S.C. § 196, Texas may contract for the Secretary of Commerce to conduct a "special census[]" on subjects covered by Title 13 of the United States Code. The statute specifically provides that the results of this special census "shall be designated 'Official Census Statistics'" that "may be used in the manner provided by applicable law."

Through this special census mechanism, Congress has made available to states that wish to voluntarily undertake mid-cycle redistricting a way to obtain contemporary data on population distributions in the state. Thus, if the Texas legislature in 2003 wanted to redistrict its congressional seats to correct real or perceived past gerrymanders, or if the Louisiana legislature wants in 2006 to redistrict its congressional districts to account for the massive population displacement caused by Hurricane Katrina, they have an option available that lets them also take into constitutional account the current reality of population dispersal.

This route to obtaining verified, accurate population counts is voluntary to be sure, but so would be the decision in the first instance to undertake the off-cycle line-drawing effort. If the redistricting effort is important

[6] *See also* Benkiser Br. at 4 ("effort to impose a *de facto* ban on mid-decade redistricting").

enough to undertake as a matter of state policy, then there is no reason that the constitutional imperative of equal population should be in a subsidiary position. While Article I, section 4, of the Constitution may invest state legislatures with the authority to legislate on the time, place, and manner of congressional elections, Article I, section 2, of that same Constitution imposes the overarching requirement that those legislatures honor the equal population rule when they do so. The special census statute provides the vehicle that lets the state legislature meet its constitutional obligation even as it exercises its constitutional prerogative. The state simply disregards this statutory option, both through its indifference when it decided to undertake the re-redistricting in 2003 and in its brief.

It must be emphasized that the option offered by § 196 is not a mandate. States are not obligated to contract for these special censuses and, therefore, their availability cannot be used as a basis for *forcing* mid-cycle redistricting under the one person, one vote rule. Congress has been careful not to create such a situation for the states. *See, e.g.*, 13 U.S.C. § 141(d) (compelling mid-decade federal census estimates but expressly forbidding their use in redistricting).

But, if a state legislature feels sufficiently compelled to voluntarily undertake the congressional redistricting task, § 196 offers a choice. Either do the job right in terms of the constitutional obligation to satisfy the equal population principle, or don't undertake the task at all.

With a congressional plan valid for the decade in hand, the state was not under the judicial gun in 2003 to act precipitously. It had time to consider whether undertaking the redistricting task to satisfy its policy concerns

was sufficiently important to justify the cost of obtaining a new, official census for the state. That the state didn't even evaluate the possibility, and weigh the options, reflects its view of the insignificance of its constitutional obligations.

Thus, the constitutional rule urged here by the Travis County Appellants is not one of timing or of institutional competence or of hidden agendas about *per se* rules. It is ultimately about matching constitutional authority and constitutional obligations. The Texas legislature's desire to exercise its constitutional authority over congressional district lines cannot be allowed to override its constitutional obligation as it exercises that authority. They go hand-in-hand.

CONCLUSION

The district court judgment, upholding Plan 1374C against the challenge that it violates the Article I, Section 2, principle of one person, one vote, should be reversed.

Respectfully submitted,

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Nos. 05-204, 05-254, 05-276 & 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

TRAVIS COUNTY, TEXAS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

EDDIE JACKSON, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

GI FORUM OF TEXAS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

On Appeal from The United States District Court For the Eastern District of Texas

BRIEF *AMICUS CURIAE* OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AND FREE ENTERPRISE COALITION IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

Does Article I, § 4 prohibit state legislatures and/or voters exercising their reserved legislative power through the initiative, from redistricting more than once in a decade, thereby eliminating the possibility of political remedies to post-census partisan gerrymanders, and increasing the frequency of lawsuits challenging such gerrymanders?

Does Article I, § 4 require federal court-ordered redistricting plans to remain in effect during an entire decade, insulated from any changes by subsequent redistricting legislation enacted by the Legislature or the voters of the state by initiative?

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

The **American Legislative Exchange Council** ("ALEC") is the nation's largest nonpartisan individual membership association of state legislators. ALEC has more than 2,400 members, comprising approximately one-third of all state legislators in the United States. Its mission is to discuss, develop, and disseminate public policies that expand free markets, promote economic growth, limit government, and preserve economic liberty. It is also generally concerned with matters of legislative accountability and governmental structure. ALEC serves as a "think tank" on many specific legislative issues and provides for its members a variety of additional resources, including a number of publications, a website (www.alec.org), and affiliation with more than 300 corporate and private foundation members. ALEC's interest in this proceeding is the protection of the state legislatures' authority over redistricting, thereby promoting the vital principle of federalism (ALEC represents *state* legislators) and a sound separation of powers (ALEC represents state *legislators*) in the areas of redistricting and elections—domains traditionally entrusted to the care of the state legislatures. U.S. CONST. art. I, § 4.[1]

The **Free Enterprise Coalition** ("FEC") is a non-profit organization incorporated in the State of Virginia. The Coalition's purpose is to engage in activities that promote policies that are supportive of the free enterprise system. The Chairman of FEC is Robert L. Livingston. For the past two years the coalition has concentrated on ensuring fair

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[1] As required by Rule 37.3(a) of this Court, *amicus curiae* have sought and received the written consent of all parties to file this brief presented. Copies of letters of consent signed by counsel are filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus curiae* state that none of the parties authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

election systems that allow citizens who are supportive of the free enterprise system to elect candidates of their choice. The coalition, principally through litigation, seeks to eliminate gerrymanders of legislative and congressional districts and replace those gerrymandered schemes with districts that provide fair representation to all citizens. During the past two years the coalition has assisted litigants and attorneys involved in redistricting litigation in Arizona, Colorado, Georgia, North Carolina, Virginia and Texas.

ARGUMENT

I. STATE LEGISLATURES HAVE CONSTITUTIONAL AUTHORITY TO REDISTRICT MORE THAN ONCE PER DECADE.

The U.S. Constitution vests the power to draw congressional district boundaries "in each state by the legislature thereof," subject to such regulations as Congress may enact. U.S. CONST. art. I, § 4; *Smiley v. Holm*, 285 U.S. 355, 366-67 (1932). That authority is unqualified as to frequency; one would search the Constitution in vain for any constitutional provision that prevents the state legislatures from exercising this authority more than once per decade. Similarly, though Congress has exercised its power to regulate congressional districting in certain respects, *see* 2 U.S.C. §§ 2a & 2c (2005), it has not limited redistricting to once-per-decade.[2]

There is no authority supporting an interpretation of Article I, § 4 as imposing a "once-per-decade" rule. This Court has never done so. It has established that redistricting immediately following each decennial Census is the minimum constitutional requirement. *See Wesberry v. Sanders*, 376 U.S. 1 (1964) (overturning Georgia's 1931 congressional redistricting plan that was malapportioned based on 1960 census data); *Reynolds v. Sims*, 377 U.S. 533 (1964). In *Reynolds v. Sims*, this Court held that failure to redistrict *at least* once every ten years "would assuredly be constitutionally suspect." *Id.* at 583-84. It further held that decennial redistricting "would clearly meet the *minimal*

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[2] Several Appellants in this case contended otherwise in the district court, but that court properly rejected such claims, noting, "It would have been remarkably easy for Congress to impose such a limitation in the text of § 2c, but it did not." *Session v. Perry*, 298 F. Supp. 2d 451, 465 (E.D. Tex. 2004) (three-judge court). No Appellant (or *amicus*) has reargued in this Court that a statutory basis exists for the alleged "once-per-decade" rule.

requirements for maintaining a reasonably current scheme of legislative representation." *Id.* (emphasis added). The Court also noted with apparent approval, however, that "the constitutions of seven States either require or permit reapportionment more frequently than every 10 years," *id.* at 583 n.65, and it disclaimed the notion that redistricting more than once in a decade is unconstitutional, stating, "[W]e do not mean to intimate that *more frequent reapportionment would not be constitutionally permissible or practicably desirable.*" *Id.* at 583-84 (emphasis added); *see also Whitcomb v. Chavis*, 403 U.S. 124, 163 n.43 (1971) (quoting *Reynolds*).[3]

Federal courts have universally applied *Reynolds v. Sims* as imposing only the constitutional *minimum* for the frequency of redistricting in the context of both legislative and congressional redistricting. These courts have also recognized that more frequent redistricting is permissible and perhaps desirable. *See, e.g., Daly v. Hunt*, 93 F.3d 1212, 1228 n.15 (4th Cir. 1996) (noting, in challenge to congressional district plan, this Court's statement in *Reynolds* that "more frequent reapportionment might be 'practicably desirable.'"); *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D. Fla. 1996) ("*Johnson II*") (three-judge panel)

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[3] A substantial majority of this Court in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), seems to have assumed that congressional redistricting more than once per decade occurs as a matter of course. In dissent, Justice Breyer argued for a measure of impermissible partisan gerrymandering based upon a range of factors, including, most prominently, the presence of mid-cycle redistricting. *Id.* at 365-67 (Breyer, J., dissenting). This proposed standard was rejected outright by five Justices of this Court. *Id.* at 541 U.S. at 299 (plurality opinion), 308 (Kennedy, J., concurring in judgment) (rejecting "the standards proposed...by our dissenting colleagues...."), 317 (Kennedy, J., concurring in judgment). No other Justice endorsed it, nor did any other Justice question the practice of more than one redistricting in a decade. *See id.* at 317-42 (Stevens, J., dissenting) & 342-55 (Souter, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court should decline to read a once-per-decade limitation into Article I, § 4. Such a limitation would largely displace state legislatures from their constitutional redistricting role, a result for which there is no authority. Additionally, adopting such a limitation would have the unintended and undesirable consequence of shielding gerrymanders from traditional political remedies, and would mire the judiciary even more deeply in the political bog.

The facts of this very case demonstrate that adopting a once-per-decade rule *will have the direct and ironic effect of insulating post-census partisan gerrymanders from subsequent legislative remedies.* As the district court held below, its 2001 redistricting plan perpetuated the most notorious partisan gerrymander of the 1990s. That gerrymander was replaced by the Texas Legislature's 2003 plan that is challenged in this case. A once-per-decade rule would leave the court-perpetuated gerrymander in place for the rest of this decade, immunized from political remedy.

Imposing a once-per-decade limitation would also crush redistricting reform movements in many states. Many of these popular movements, embodied in initiatives, include proposals to replace perceived 2001 congressional gerrymanders with new, non-gerrymandered plans before the 2010 census. A constitutional rule prohibiting redistricting more than once in a decade would snuff-out these reform efforts and lock in early-decade gerrymanders until 2012.

By adopting a rule prohibiting redistricting more than once in a decade, this Court would also hasten the fulfillment of Alexis de Tocqueville's trenchant observation that "[s]carcely any political question arises in the United States that is not resolved, sooner or later, into a judicial

question." 1 A. de Tocqueville, DEMOCRACY IN AMERICA 280 (P. Bradley ed. 1948). A once-per-decade rule will increase the demand for judicial redistrictings in two ways. First, it will increase the incentive for political parties who do not control post-census legislative redistricting to do whatever they can to stymie the process and force redistricting into the courts in the hope of receiving better treatment than from the computers of the majority party. Intervening in this most political of activities is a task that this Court has repeatedly characterized as "unwelcome." Alternatively, in those states where legislative redistricting *does* take place, the rule will lead to an increase in post-enactment legal challenges: deprived of any political remedy for perceived post-census partisan gerrymanders, the aggrieved will have no choice but to turn to the courts for relief. Thus, after the decade's first plan is in place, the proposed once-per-decade rule would exclude polifical actors from the redistricting process, formerly deemed to be solely a "political question", and invest the courts as the primary tenants of the "political thicket." Such a result is one the Court should accept only if the Constitution demands it, and the Constitution does not.

(noting in challenge to congressional districting, "Since decennial redistricting is the constitutional minimum required, a state is free to adopt new redistricting plans in between regularly scheduled decennial reapportionments."), *aff'd sub nom., Johnson v. Smith*, 132 F.3d 1460 (11th Cir. 1997); *Klahr v. Williams*, 339 F. Supp. 922, 925 (D. Ariz. 1972) (three-judge panel) (holding, in challenge to both congressional and state legislative districts, "Obviously, we could not but approve a plan which the Arizona Legislature might adopt providing districting and apportionment based upon dependable population figures to be carried out more frequently than every ten years; but that we cannot require the Legislature to do so clearly appears from" *Reynolds*); *see also Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) ("*Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall."); *French v. Boner*, 786 F. Supp. 1328, 1331 n.4 (M.D. Tenn. 1992) ("Legislative reapportionment more frequently than every ten years, although not required, is permissible. *Reynolds*, 377 U.S. at 583-84...."); *Buckley v. Hoff*, 243 F. Supp. 873, 878 (D. Vt. 1965) (three-judge panel) ("All the parties apparently also concede that reapportionment ... of the [Vermont State] House of Representatives every eight years ... is in full accord with the Equal Protection Clause. We again agree.").

No state's supreme court has ever found a "once-per-decade" limitation buried in the language of Article I, § 4. State supreme courts that invalidated a subsequent redistricting after the first post-census plan was enacted, have all done so based solely on unique state law provisions, rather than federal law. *See, e.g., People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied sub nom., Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004); *Legislature v. Deukmejian*, 669 P.2d 17, 23 (Cal. 1983) (collecting cases); *Harris v. Shanahan*, 387 P.2d 771 (Kan. 1963); *Jones v. Freeman*,

146 P.2d 564 (Okla. 1943); *People ex rel. Mooney v. Hutchinson*, 50 N.E. 599 (Ill. 1898); *Harmison v. Ballot Comm'rs*, 31 S.E. 394 (W. Va. 1898).

Furthermore, a number of states have adopted explicit state constitutional or statutory rules prohibiting congressional redistricting after the first mandatory post-Census plan. *See* ARIZ. CONST. art. IV, pt. 2, § 1; CONN. CONST. art. III, § 6; HAW. CONST. art. IV, §§ 1, 2; MONT. CONST. art. V, § 14; Idaho Code § 72-1501 (2005); 21 Maine Rev. Stat. Ann. § 1206 (2005); N.J. Stat. § 19:46-12 (2005); Tenn. Code Ann. § 2-16-102 (2005); Wash. Rev. Code §§ 44.05.030 & 44.05.110 (2005). Of course, had the U.S. Constitution been understood to preclude redistricting more than once a decade, these enactments would have been unnecessary. By the same token, if Congress wished to impose a once-a-decade rule for congressional districting, Article I, § 4, plainly authorizes it, but Congress has not chosen to do so.[4]

The understanding of Article I, § 4 evidenced by the foregoing authorities is consistent with the historical record of the founding era. For example, the experience of New Jersey in the years immediately following the Constitution's adoption betrayed no hint of an understanding that the Constitution limited the frequency with which legislatures might change congressional electoral systems. Within the space of 15 years, from 1798 to 1813, for purely partisan reasons, the New Jersey legislature switched four times from at-large to district-based congressional elections, with one

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[4] Of course, if the U.S. Constitution had ever been understood to preclude redistricting more than once in a decade, congressional action would be unnecessary as well. Nevertheless, there are currently three separate bills pending before Congress that would expressly prohibit redistricting after a valid post-census plan is enacted. *See* H.R. 4094, 109th Cong. § 2 (2005) (Rep. Lofgren); H.R. 2642, 109th Cong. § 2 (2005) (Rep. Tanner); H.R. 830, 109th Cong. § 1 (2005) (Rep. Waters).

switch to at-large elections taking place just days before the 1800 election. Rosemarie Zagarri, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776-1850 (Cornell 1987), at 115-17. And one New York assemblyman objected to district-based elections in the year following the Constitution's adoption on the ground that the principle of population equality would "render it necessary to pass a new bill every year or two; our election law, therefore, could only be a temporary one." *Id.* at 120-21 (quoting *Daily Advertiser*, Dec. 19, 1778).

These voluminous authorities demonstrate, that there is no constitutional basis for morphing Article I, § 4's *minimum* requirement of redistricting once per decade into the constitutional *maximum* as well.

II. ENSHRINING A "ONCE-PER-DECADE" RULE INTO THE CONSTITUTION TO LOCK-IN A FEDERAL COURT-DRAWN PLAN WOULD DISPLACE STATES FROM THEIR CONSTITUTIONAL ROLE UNDER ARTICLE I, § 4.

The enunciation of a "once-per-decade" rule in this case would unnecessarily cement in place a congressional redistricting plan drawn by a federal district court, and severely transgress the long-recognized authority of state legislatures, and, as needed, state courts, to draw redistricting plans. This Court has repeatedly held that, "the Constitution leaves the States primary responsibility for apportionment of their federal congressional ... districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature."); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court."). The deference mandated by these

precedents extend to redistricting plans crafted by state courts as well. *Growe*, 507 U.S. at 34 (citing *Scott v. Germano*, 381 U.S. 407 (1965); *Chapman*, 420 U.S. at 27.)

The Constitution requires deference to the States. A district court is precluded by the principle of separation of powers from usurping a state legislature's authority to adopt a constitutional redistricting plan, except in narrowly defined circumstances. Separation of powers does not arise from any provision of the Constitution, but exists because "behind the words of the constitutional provisions are postulates which limit and control." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934). Under the doctrine of separation of powers, government is composed of three separate but coequal branches. Consequently, unless otherwise expressly provided or incidental to the powers conferred, ... the judiciary cannot exercise either executive or legislative power." *Springer v. Phillipine Islands*, 277 U.S. 189, 201-202 (1928). Deference to legislative redistricting enactments, based upon the doctrine of the separation of powers, has been exercised in cases ranging from congressional redistricting to the apportionment of local parish councils. *Upham v. Seamon*, 456 U.S. 37 (1982); *Grisbaum v. McKeithen*, 336 F. Supp. 267 (E.D. La. 1971).

The express grant to the States in Article 1, § 4 of the power to draw congressional district lines also implicates principles of federalism. Federalism is based upon the belief that a diffusion of power between two governments, federal and state, will enhance the freedom of the people. *See Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991); *see also New York v. United States*, 505 U.S. 144 (1992) ("The Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself; 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'" (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). *Johnson II*, 926 F. Supp. at 1494

n.72 ("we cannot deny the Florida Legislature the first opportunity to adopt a new redistricting plan. Not only is it required under existing constitutional law and the doctrines of federalism and separation of powers, but to do otherwise would encourage the very type of judicial activism in the political process that this Court has a duty to avoid.").

There are practical reasons for the delegation of this responsibility to the States:

> [A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name.

Connor v. Finch, 431 U.S. 407, 414-15 (1977); *Upham*, 456 U.S. at 43-44 (quoting *Connor* in the context of congressional redistricting); *see Vera v. Bush*, 933 F. Supp. 1341, 1344 (S.D. Tex. 1996) ("*Vera I*") (following affirmance in *Bush v. Vera*, 517 U.S. 952 (1996), district court opinion about remedy for unconstitutional congressional districts).[5]

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[5] For a discussion of various competing factors and interests (besides partisanship) that legislatures are best equipped to consider as part of the redistricting process, including, *inter alia*, compactness, contiguity, preservation of political subdivisions, concerns voiced by the public, concerns voiced by organized groups, whether and how to maintain continuity in the delegation so that the state may still have access to federal largesse and have better influence on legislation, and competing communities of interest, *see* Clark Benson, *Substantial Political Consequences, A Practitioner's Perspective on Redistricting*, EXTENSIONS (Carl Albert Congressional Stud. & Research Ctr. Fall 2004), *at* http://www.ou.edu/special/albertctr/extensions/fall2004/Bensen.html. *See also Georgia v. Ashcroft*, 539 U.S. 461, 483-84 (2003) ("the State's choice [whether to use influence or coalitional districts in avoiding retrogression under Voting Rights Act § 5]

In the face of the Constitution's express grant of redistricting power to the States, and the principles of separation of powers and federalism, the federal courts' role is necessarily a limited one. They are called upon to take up the unwelcome task of redistricting only when a state legislature fails to enact a plan that meets federal constitutional or statutory requirements, or fails to redistrict in a timely manner. *Reynolds*, 377 U.S. at 586 ("...[R]eapportionment is primarily a matter for legislative consideration and determination, and ... judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so."); *Growe*, 507 U.S. at 34 ("Absent evidence that these state branches will fail timely to perform that [redistricting duty], a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."); *Upham*, 456 U.S. at 41-42 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in

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ultimately may rest on a political choice of whether substantive or descriptive representation is preferable."); *Gonzalez v. Monterey County*, 808 F. Supp. 727, 733-34 (N.D. Cal. 1992) ("In delaying the election, foremost in the court's mind is the Supreme Court's observation that a 'legislature is . . . by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality.' ... [¶] ... The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution dictates that redistricting plans achieve fair representation for all citizens. [Citation.] On the other hand, California recognizes the importance of '(a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests' in drawing legislative districts.").

a timely fashion after having had an adequate opportunity to do so.' ... In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" (quoting *White v. Weiser*, 412 U.S. 783, 794-95 (1973))).

Moreover, even in circumstances where a legislature's plan is determined to be infirm, the rule is that a federal court must accord the legislature a reasonable opportunity to remedy the defect before a judicial plan is imposed. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan."); *Vera I*, 933 F. Supp. at 1345-46.

A state legislature is not deposed from its redistricting role for an entire decade either because it failed, for whatever reason, to enact a new plan in timely fashion after the Census data were released, or because it was unable to enact a remedial plan when given an opportunity to do so. A contrary rule would overrule decades of federal court precedent heeding this Court's admonition to defer to the States to redistrict. *See Session v. Perry*, 298 F. Supp. 2d at 460 n.14 (citing numerous cases).

Federal courts imposing remedial congressional district plans have routinely designated them "interim" plans and indicated their expectation that the plans would (or should) be replaced with appropriate legislatively-drawn plans. *See id; see also Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 670-71 (D.S.C. 2002) (future elections to be conducted according to court-drawn congressional plans "unless and until the South Carolina General Assembly...ends its current impasse and enacts an alternative redistricting plan for the legislative body at issue"); *Vera v. Bush*, 980 F. Supp. 251, 253

(S.D. Tex. 1997) (*"Vera II"*) ("Because the legislature has failed to act, this Court is left with the 'unwelcome obligation' of providing a congressional redistricting plan for the 1998 and millennial election cycles *pending later legislative action.*" (emphasis added)); *Johnson v. Mortham*, 915 F. Supp. 1529, 1544 (N.D. Fla. 1995) (*"Johnson I"*) (revising prior injunction to clarify that court-drawn congressional plan not "permanent," *i.e.*, effective until the next census, because "the law is clear that a state legislature always has the authority to redistrict or reapportion, subject to constitutional constraints."); *Vera I*, 933 F. Supp. at 1346 ("[T]his Court's remedy is an interim plan and the Court will require the legislature to prepare its own constitutional redistricting plan next year."); *Burton ex rel. Republican Party v. Sheehan*, 793 F. Supp. 1329, 1369 (D.S.C.) ("It is our hope that the General Assembly and the Governor will work together and fashion acceptable plans. In the interim, [this is] the plan[] for the...United States Congressional districts."), *vac'd on other grounds sub nom., Statewide Reapportionment Advisory Comm. v. Theodore*, 506 U.S. 951 (1992); *Jordan v. Winter*, 604 F. Supp. 807, 809 (N.D. Miss. 1984) (imposing, at plaintiffs' request, a "court-ordered interim plan for the 1982 congressional elections and thereafter *until changed by law.*" (emphasis added)). Thus, the district court below is merely the latest in a long line of federal courts to have recognized, relying on *Reynolds*, the authority of state legislatures to redistrict as frequently as they deem it to be "practicably desirable." *Reynolds*, 377 U.S. at 584; *see Henderson v. Perry*, 399 F. Supp. 2d 756, 2005 U.S. Dist. LEXIS 38273, *64 n.85 (E.D. Tex. 2005) (three-judge court).

III. LIMITING REDISTRICTING TO ONCE PER DECADE IS AT LEAST AS LIKELY TO ENTRENCH PARTISAN GERRYMANDERING AS TO DISCOURAGE IT.

A. Prohibiting Redistricting More Than Once Per Decade Would Deprive States Of An Important Tool For Combating Egregious Gerrymanders.

Perhaps the foremost irony of this case is that, if the Court were to strip the Texas Legislature of its ability to replace the federal-court drawn plan, *it would thereby have the direct effect of locking in an admitted partisan gerrymander.* As the district court explained below, "The State's description of the 2003 Texas legislative plan as dismantling a prior partisan gerrymander that had entrenched a minority party, in order to allow a party with overwhelming statewide voting strength to capture two-thirds of Texas's congressional delegation, is a characterization that the record supports." *Henderson*, 399 F. Supp. 2d at __, 2005 U.S. Dist. LEXIS 38273, at *44. The district court further elaborated,

> While the present plan, drawn by a Republican Party majority in 2003, has been decried as egregious, the story must begin with the earlier map drawn by a Democratic Party majority in 1991. *That plan, put in place following the 1990 census, was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other.* In 2000, the Democratic Party gerrymander was still in place and, although Republicans now enjoyed substantial statewide majority strength, the results of the congressional elections favored Democrats by a seventeen to thirteen margin. ... [¶]

> *... The map drawn by this court in 2001 perpetuated much of this gerrymander.*

Id. at *37-*38 (emphasis added; footnotes omitted); *see also id.* at *37 n.47 (Texas Democratic plan the "shrewdest gerrymander of the 1990s" (*quoting* Michael Barone, THE ALMANAC OF AM. POLITICS 2002, at 1448 (2001))).

Teasing a once-per-decade rule out of Article I, § 4, would eliminate an important political remedy against a post-census gerrymander, namely subsequent legislative actions designed to undo the gerrymander's deleterious effects.

Perhaps the most widely-documented example of this effect is the California Supreme Court's adoption of a once-per-decade rule in 1983, applicable to both the Legislature and the people acting through the initiative. *Legislature of the State of Cal. v. Deukmejian*, 669 P.2d 17 (Cal. 1983). Following the 1980 Census, Democratic majorities controlled the California Legislature. *Badham v. Eu*, 694 F. Supp. 664, 666 (N.D. Cal. 1988). In 1981, voting along party lines, the Legislature adopted a new plan for congressional and legislative districts. *Id.* That plan, authored by the late Congressman Philip Burton and dubbed by pundits the "Burtonmander," was "considered one of the most notoriously partisan gerrymanders in recent years." Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 573 (1993); John H. Fund, *Beware the Gerrymander, My Son*, NAT'L REV., Apr. 7, 1989, at 34.

California voters promptly qualified a referendum to rescind the "Burtonmander," which the Democratic State Assembly challenged in California's courts. The state Supreme Court upheld the referendum, but ordered the Burton plan to be used for the 1982 congressional and legislative elections. *Assembly v. Deukmejian*, 639 P.2d 939 (Cal. 1982); Fund, *supra*, at 34. Consequently, though

California's voters "overwhelmingly rejected" the Burton plan at the June 1982 primary, Democrats made significant gains in the Legislature and in the congressional delegation that November. *Legislature v. Deukmejian*, 669 P.2d at 684 (Richardson, J., dissenting); *Badham*, 694 F. Supp. at 666; Fund, *supra*, at 34.

Despite the voters' disapproval of the Burtonmander, at an extraordinary session that fall the Legislature adopted a new plan—dubbed "Son of Burton"—making only minor changes to the rejected gerrymander, and locking in the new Democratic gains; it was signed by outgoing Governor Brown just hours before the new Republican Governor, George Deukmejian, was sworn into office. Fund, *supra*, at 35; *Badham*, 694 F. Supp. at 666. The Legislature designated the new plan "urgency" legislation, precluding further use of the referendum power. *Legislature v. Deukmejian*, 669 P.2d at 684 (Richardson, J., dissenting).

California voters reacted again, promptly qualifying an initiative that would have repealed the "Son of Burton" plan, and replaced it with a new plan thought to embody "good government" principles. *Id.*; Fund, *supra*, at 35. In another legal challenge by the Democratic Legislature, the California Supreme Court prohibited a vote on the initiative, holding that under California's Constitution a valid redistricting could only be enacted, whether by the Legislature or by initiative, once per decade, and "Son of Burton" was that plan. *Id.* at 22-31 (majority opinion). The effect was predictable: The following year, Republicans received an absolute majority (50.1%) of the congressional vote statewide, but only 40% of the state's congressional seats. *Badham*, 694 F. Supp. at 670. A similar disparity prevailed throughout the decade. Fund, *supra*, at 34. Consequently, the adoption of California's once-per-decade rule locked in an acknowledged partisan gerrymander. The adoption of such a rule in this case would do the same.

B. A "Once-Per-Decade" Rule Would Also Stymie Redistricting Reform Efforts By Voters Themselves.

More recently, movements to reform redistricting have sprung up across the nation in response to perceived redistricting abuses after the 2000 Census, including in California (again), Ohio, Michigan, Florida, Georgia, Maryland, Massachusetts, and Rhode Island. *See* Adam Nagourney, *States See Growing Campaign for New Redistricting Laws*, N.Y. TIMES, Feb. 7, 2004, at A1. A number of these reform efforts are incorporated in initiative proposals and include provisions to replace existing post-2000 redistricting plans with new plans during the decade. Yet a rule interpreting the federal Constitution as prohibiting redistricting more than once per decade would also apply to the people exercising their reserved legislative power[6], and would threaten to stymie such reform efforts, again locking in the alleged existing gerrymanders.

For example, 2005 witnessed renewed efforts in California to reform the redistricting process by means of direct democracy. Douglas Johnson, *et al.*, RESTORING THE COMPETITIVE EDGE: CALIFORNIA'S NEED FOR REDISTRICTING REFORM AND THE LIKELY IMPACT OF PROPOSITION 77, at 16 (Rose Institute 2005), *at* http://rose.claremontmckenna.

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[6] *See Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916) (redistricting by the "legislature" includes the people acting by direct democracy, because they exercise part of the state's legislative power); *see also Smiley v. Holm*, 285 U.S. at 355 (redistricting by the "legislature" includes the law-making power as defined by the State's constitution, including Governor's veto power). Furthermore, this Court has held that "the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 194 (1999).

edu/redistricting/redistricting.asp. Voters qualified an initiative measure, Proposition 77, which would have amended the State's constitution to require an independent commission to conduct all future redistrictings of state legislative and congressional districts. It would have also required the commission to adopt a redistricting plan to replace the perceived bipartisan gerrymander enacted in 2001 by the Legislature. These efforts were endorsed by good-government groups including Common Cause, and all of the State's major newspapers. *See* Editorial, Our Election Guide, L.A. TIMES, Nov. 8, 2005, at B12; *Common Cause, Two Other Groups Back Redistricting Measure*, ASSOC. PRESS, Oct. 5, 2005 (On Lexis-Nexis); Paul Thornton, *Editorials Elsewhere: Endorsements Elsewhere*, L.A. TIMES, Nov. 8, 2005, at B12.

Likewise, in Ohio an initiative was recently qualified to implement redistricting by commission, which also would have replaced the current congressional plan, believed to be a gerrymander, with a new plan. That measure was also backed by good government groups including Common Cause. *See* Dean E. Murphy, *Ohio Critics of G.O.P. Start Battle to Change Election Process*, N.Y. TIMES, Aug. 10, 2005, at A12; Dean E. Murphy, *Schwarzenegger Enters Debate Over Redistricting In Ohio*, N.Y. TIMES, Oct. 17, 2005, at A22.

Similar reform efforts are also underway in Michigan and Florida and include new redistricting to undo perceived gerrymanders in those states. Editorial, *Districts*, LANSING ST. J., Apr. 6, 2005, at 6A. *See* Fla. Dept. of State, Div. of Elec., IMPLEMENTATION OF APPORTIONMENT & DISTRICTING COMM'N NO. 05-16, *at* http://election.dos.state.fl.us/initiatives/initdetail.asp?account=41643&seqnum=3.

This Court should not adopt a rule prohibiting redistricting more than once in a decade. Such a rule not only would insulate post-census gerrymanders from subsequent political remedies, but also would jeopardize popular reform efforts like those detailed above. What's more, it would also frustrate the opportunity for voters to

attempt to overturn a gerrymander by electing new officeholders who might take on the task, because that task would be foreclosed by the once-per-decade rule.

IV. A PROHIBITION ON REDISTRICTING MORE THAN ONCE IN A DECADE WOULD RESULT IN A MULTIPLICITY OF POST-CENSUS PARTISAN GERRYMANDER SUITS AND WOULD INCREASE THE DEMAND FOR COURT-DRAWN PLANS.

In defending the overall justiciability of partisan gerrymandering claims in *Vieth*, Justice Breyer noted in dissent that "[c]ourts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will." 541 U.S. at 362 (Breyer, J., dissenting). He premised this observation on the existence of numerous political remedies available to "undo the harm that districting has caused the majority's party, in the next round of districting *if not sooner*." *Id.* (emphasis added). If this Court adopts a prohibition on redistricting more than once in a decade, however, courts will be forced to intervene more frequently, because interim political solutions will be precluded. Indeed, such a prohibition would significantly increase the burdens on the judiciary in two ways.

First, such a rule will mean that courts will increasingly be compelled to accept the "unwelcome obligation" of drawing plans in the first instance. *Connor v. Finch*, 431 U.S. at 415. The party whose legislative members are likely to lose out in post-census redistricting will have every incentive to stall in an effort to force the process into the courts instead, hoping to fare better in the judicial arena than in the political, and knowing that a court plan would foreclose any subsequent plans by the political branches.

Second, in those states where legislative districting *does* take place, a prohibition on subsequent redistricting would almost surely result in a greater number of post-census

partisan gerrymandering claims. Litigation will be the only remedy for those aggrieved by perceived gerrymanders because political remedies will have been precluded by this Court. *See Badham*, 694 F. Supp. at 666-67 (deciding partisan gerrymandering challenge to "Son of Burton" plan after Cal. Supreme Court enunciated state "once-per-decade" rule).

Increasing the frequency with which redistricting will default to the federal courts is inconsistent with this Court's precedents. Those precedents have sought to prevent federal courts from becoming "bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney v. Cummings*, 412 U.S. 735, 749-50 (1973). Thus, the Court has sought to avoid standards that would draw the judiciary so decisively into the political redistricting bog, and has held, in the context of congressional reapportionment, that courts "should not ... 'intrude upon state policy any more than necessary.'" *White v. Weiser*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. at 160). Consistent with this principle, the Court held in *Gaffney* that it would not

> mak[e] the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan.....

Id. at 749-50.

Similarly, in *Davis v. Bandemer*, the Court was careful not to adopt too lenient a test for identifying unconstitutional partisan gerrymanders, noting,

> Inviting attack on minor departures from some supposed norm would *too much embroil the judiciary* in second-guessing what has consistently been

> referred to as a political task for the legislature, a task that should not be monitored too closely unless the express or tacit goal is to effect its removal from legislative halls. *We decline to take a major step toward that end, which would be so much at odds with our history and experience.*

478 U.S. 109, 133-34 (1986) (emphasis added); *see also Vieth*, 541 U.S. at 300 (plurality opinion) ("Is the regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process and the partisan enmity it brings upon the courts, worth the benefit to be achieved...? We think not.").

An increase in court-drawn plans and judicial "second-guessing" of legislatively-drawn plans would be the inevitable impact of a prohibition on redistricting more than once in a decade. These are results to be avoided, if possible, in the absence of a clear constitutional mandate to the contrary—a mandate that is lacking here.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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GI FORUM OF TEXAS, *et al.*

Petitioners,

v.

PERRY, GOV. OF TEXAS, *et al.*

Defendant,

On Appeal from the United States District Court for the Eastern District of Texas

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~~**MOTION FOR LEAVE TO FILE AND**~~

BRIEF FOR EDWARD BLUM, VISITING FELLOW AT THE AMERICAN ENTERPRISE INSTITUTE, AND ROGER CLEGG, PRESIDENT OF THE CENTER FOR EQUAL OPPORTUNITY AS *AMICI CURIAE* IN OPPOSITION TO APPELLANTS

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Amici Curiae, Edward Blum, Visiting Fellow at the American Enterprise Institute, and Roger Clegg, President of, and on behalf of, the Center for Equal Opportunity, by and through their counsel for this matter, Frank M. Reilly and Marc A. Levin, Potts & Reilly, L.L.P., hereby move this Honorable Court for an order permitting these parties to file a Brief *Amici Curiae* in opposition to the Appellants.

In 2005, the Project on Fair Representation at the American Enterprise Institute commissioned two social scientists to gather data on the state of minority participation in the election process. The Center for Equal Opportunity is the only think tank devoted exclusively to the promotion of colorblind equal opportunity and racial harmony. Blum and Clegg have worked to advance race-neutral principles in the areas of education, public contracting, public employment, and voting. They have a substantial interest in limiting or eliminating the use of race as a factor in redistricting and respectfully submit this brief *Amici Curiae* in opposition to Appellants in these cases

Therefore, these *Amici* hereby respectfully move this Court for leave to file their *Amici* Brief as friends of the Court in opposition to Appellants.

Respectfully submitted,

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Amici Curiae Edward Blum, Visiting Fellow at the American Enterprise Institute, and Roger Clegg, President of, and on behalf of, the Center for Equal Opportunity respectfully submit this brief in opposition to the Appellants in these cases.[1]

INTEREST OF *AMICI CURIAE*

In 2005, the Project on Fair Representation at the American Enterprise Institute commissioned two social scientists to gather data on the state of minority participation in the election process (cited at pp. 14-21 of this brief). The Center for Equal Opportunity is the only think tank devoted exclusively to the promotion of colorblind equal opportunity and racial harmony. Blum and Clegg have worked to advance race-neutral principles in the areas of education, public contracting, public employment, and voting. They have a substantial interest in limiting or eliminating the use of race as a factor in redistricting and respectfully submit this brief *Amici Curiae* in opposition to Appellants in these cases.

INTRODUCTION

John F. Kennedy stated "Race has no place in American life or law." Kennedy, John F., *Radio and Television Report to the American People on Civil Rights*, June 11, 1963. It is this goal that animated the Voting Rights Act ("VRA" or "Act") enacted two years later in 1965. Aiming to fulfill John F. Kennedy's clarion call for race neutrality in law and Martin Luther King's dream of a colorblind society, the Act mandated, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision" that denies or abridges "the right of any citizen of the United States to vote on account of race or color . . ." 42 U.S.C. § 1973(a) (1982).

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, has made a monetary contribution to the preparation or submission of this brief.

The VRA sought to ensure race-neutral election procedures, thereby undoing the vestiges of segregation and Jim Crow. The VRA's goal of promoting minority voter participation has been fulfilled in Texas, as minorities are voting in high numbers and the state has elected numerous minority officials. Yet, the Appellants ask this Court to make Texas the vehicle for an unprecedented judicially-imposed expansion of the use of race in redistricting. They contend, without support in statute, case law, or legislative history, that Section 2 of the VRA not only precludes retrogression in the number of majority-minority districts, but also requires that any district where minorities make the difference in electing a white Democrat be etched in stone as a so-called minority-influence district. This claim is strikingly inconsistent with Appellants' attack on the Texas plan as excessively partisan. Appellants' proposed requirement for devising and preserving minority-influence districts employs race a tool for guaranteeing certain partisan outcomes, conferring an entitlement on Anglo Democrat incumbents elected with a decisive minority vote by freezing their districts over time. To accede to this demand would inject further partisanship into the redistricting process, exceed the clear language and intent of the VRA, and violate the Equal Protection clause by favoring the preferred outcomes of some voters and politicians over others on the basis of race.

The only constitutional and justiciable standards for redistricting require plans that: 1) satisfy the one person, one vote guarantee through equipopulous districts; 2) do not advantage or disadvantage voters on the basis of race. Because the 2003 Texas redistricting map at issue (Plan 1374C) meets these criteria, it should be upheld.

ARGUMENT

A. No Constitutional Violation Due to Excessive Partisanship or Timing of Plan

A majority of this Court has determined that either there can be no standard for determining how much partisanship is

too much, or at the least, that no judicially manageable standard has yet been identified. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Even if some such standard could be divined, Plan 1374C would more easily satisfy the standard than its immediate predecessors, including the 1991 congressional gerrymander.[2] Prior to the 2004 election, Democrats held a 17-15 advantage in the Texas congressional delegation. Yet in 2000, 56 percent of Texans voted for a Republican candidate to the U.S. House and all Texas statewide officials since then have been Republicans.[3] Preston, Bryan, *Red River Run*, NATIONAL REVIEW, May 27, 2003. The panel noted that the "emergence of Texas as a two-party-state" combined with Plan 1374C has

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[2] The 1991 gerrymander was based on the 1981 scheme, both of which were heavily influenced by partisan considerations and Congressman Martin Frost. The *Boston Globe* characterized the process as "partisan gerrymandering, with lines drawn to strengthen friends and oust enemies" and noted: "There have been outbreaks of hostility between blacks and browns as well as whites, and a black legislator from Dallas cut his finger severely last week when he broke a cocktail glass during an argument." Wilkie, Curtis, *Texas Plays High-Stakes Redistricting Game*, THE BOSTON GLOBE, May 27, 1981. Frost was cofounder of IMPAC 2000, a Democratic national organization that in 1991 pushed for gerrymanders in Texas and other states with the express purpose of locking in large Democrat congressional majorities. Barone, Michael, *Republican jujitsu against liberals*, U.S. NEWS & WORLD REPORT, April 22, 1991. Frost's 1991 map approved by the Democrat-controlled Texas House rejected the proposal by minority leaders and the few Republican legislators at the time to create a majority-minority district in Tarrant County. *See*, THE HOTLINE, August 21, 1991, noting Frost's plan was approved "despite the objections of some ethnic minorities that the plan favors protection of incumbents over the creation of solidly minority districts." Frost spoke candidly about the Democrats' success in accomplishing their partisan goals through the 1991 legislative redistricting: "To the extent that they [Republicans] made any gains, it was due to the federal judiciary." Wolf, Richard, *House Remapping Benefits Minorities, Women and GOP*, USA TODAY, June 8, 1992.

[3] The 56 percent figure likely underestimates the true statewide Republican voting strength for Congress in 2000, because of Democrats' incumbency advantage.

"caused the Texas delegation now to approximate the relative statewide voting strength of the two parties." *Henderson v. Perry*, 399 F.Supp.2d 756, 758 (E.D. Tex. 2005). If the best indicator of excessive partisanship is yielding outcomes that are unrepresentative of the electorate, it is the 1991 scheme engineered by former Congressman Martin Frost that fits the bill.[4] Now, the Appellants are asking this Court to saddle Texas with that undemocratic gerrymander for a full two decades.[5]

While the current Texas congressional delegation is somewhat more Republican than the state as a whole, this is a natural result of compact districting because the Democratic voters in Texas are highly concentrated in the urban centers and along the Mexican border. *See*, Bishop, Bill, *The Great Divide*, AUSTIN AMERICAN-STATESMAN, December 4, 2004. Although rural Texas was once home to many conservative Anglo Democrats, a well documented political realignment in Texas and other southern states occurred over the past several decades. *Id.* Thus, rather than causing a partisan shift, Plan 1374C is more properly viewed as accurately reflecting a shift that had already occurred.

Plan 1374C was motivated by compactness, keeping counties, cities, and school districts together where possible, avoiding the splitting of precincts, and adhering to nearly exact population parity among districts. J.S. App., at 30a. Far from grafting partisanship on to an objective existing map, the Legislature had a strong and legitimate remedial motivation—removing the partisan bias of the 1991 plan. The panel acknowledged that "the plan produced by this court

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[4] "The [Texas 1991 congressional redistricting] plan carefully constructs Democratic districts with incredibly convoluted lines and packs heavily Republican suburban areas into just a few districts." Barone, Michael, *The Almanac of American Politics 2004*, at 1448 (Nat'l Journal Group 2003).

[5] The 2000 and 2001 judicial modifications of the 1991 plan largely kept the same lines intact, resulting in the re-election of all incumbents.

perpetuated much of the 1991 Democratic Party gerrymander" that the court itself found unfairly allowed Democrats to control the majority of congressional seats while Republicans won 59 percent of the statewide vote. *Henderson v. Perry*, 399 F.Supp. at 764. The panel concluded "it is not clear that acting to *undo* a perceived disadvantage imposed previously by an opposing party is irrational in the sense that it admits of no salutary or constitutionally acceptable result." *Id.* at 767 (emphasis in original).

Article I, Section IV of the Constitution delegates congressional redistricting to state legislatures. This is one pillar of the Constitution's federalist system, which originally also trusted state legislators to select U.S. Senators. Imposing judge-made constraints on the extent to which partisan considerations may influence legislatures and the times when they may conduct redistricting would contravene this provision and the principles of federalism on which it is based.

Appellants' reliance on *Larios v. Cox*, 542 U.S. 947 (2004) is misplaced. Whether partisan redistricting is constitutionally or statutorily prohibited was not decided in *Larios*.[6] *Id.* at 949-950 (Stevens, J., concurring). Rather, *Larios* was a one person, one vote case where the district court found that population deviations of up to ten percent were systematically used to underpopulate Democratic-leaning rural and inner-city areas and overpopulate Republican suburban areas. It is undisputed that, under Plan 1374C, population deviations are no more than one person. Therefore, there is no cognizable one person, one vote constitutional issue.

This University Professors' claim that mid-decade redistricting using the last Census violates one person, one vote cannot be squared with the Constitution's requirement that

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[6] While partisanship was not at issue, the Georgia plan there was significantly more partisan than 1374C. For example, half of the Republicans in the Georgia Legislature were paired while less than a third of Texas Democrats in Congress lost their seats.

the decennial census be used for apportioning congressional representation. U.S. CONST. art. I, § 2, cl. 3; id. amend. XIV, § 2. By authorizing state legislatures to redraw districts based on the Census and giving Congress, not the courts, the power to regulate the exercise of that authority, the Constitution permits legislatures to engage in mid-decade redistricting. However, the Professors contend that updated population numbers from some source other than the last Census must be used. Aside from raising a serious constitutional question, some states' use of non-Census data would result in congressional districts with populations that diverge from the current 640,000 benchmark in states with at least two congressional districts, undermining the goals of equipopulousity and uniformity among the states.

If this Court goes beyond the one person, one vote standard to divine some necessarily subjective evaluation as to how much partisanship is too much, the Court will continually referee redistricting disputes from Congress to school boards. Suppose a city annexed an unincorporated suburb and then redrew its city council district lines? If the annexation benefited one party, would it be legal?

While determining after the fact whether a plan is excessively partisan is vexing, it is comparatively easy to modify the redistricting *process* to reduce partisan influence. Independent bipartisan or nonpartisan commissions have been successfully implemented as alternatives to partisan legislative redistricting in 12 states, as well as England and Australia. Elmendorf, Christopher S., *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L.REV. 1366, November 2005. Texas State Senator Jeff Wentworth (R-San Antonio) has introduced legislation establishing such an independent commission that would be instructed to avoid favoring or

discriminating against any political party or group.[7] That these commissions have reined in creative line drawing to produce artificially uncompetitive districts, a benefit that is unlikely to accrue from judicial rulings that simply invalidate plans as excessively partisan, resulting in another slightly less partisan incumbent protection plan. If federal courts undertake the role of superintending whether redistricting outcomes are too partisan, the perceived need for reforms that create institutions better situated than the judiciary to check partisan redistricting could be reduced.

B. SECTION 2 OF THE VRA SHOULD BE INTERPRETED TO AVOID CONSTITUTIONAL QUESTIONS

Statutes should insofar as possible be construed to avoid raising constitutional issues. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This principle counsels against Appellants' proposed expansive interpretation of Section 2 to protect white Democratic incumbents in districts where minorities' votes form the margin of victory.

Under the Appellants' theory, congressional districts represented by white Democrats that become more Republican over time must be redrawn at every opportunity to offset the change in partisan identification by increasing the number of minorities. Ostensibly, this would be true even if one source of the change in partisan identification was that minorities in the district themselves became more Republican.

The Appellants' proposed outcome-based rule that would freeze in place so-called coalition districts creates unneeded tension with both the plain language of Section 2 and the Fourteenth and Fifteenth Amendments. If minorities are granted an endlessly renewable guarantee to their desired

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[7] Senator Wentworth presented his bill to create the commission for the first time in 1992 when a Democratic majority in the Texas Senate voted it down. Reeves, Stuart, *Wentworth Proposes Special Commission*, THE DAILY TEXAN, June 26, 2003.

electoral outcomes, white voters are by definition necessarily disfavored. Section 2 and the Fourteenth and Fifteenth Amendments safeguard the rights of all voters, including whites, by prohibiting the denial or abridgement of the right to vote on account of race or color. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court applied strict scrutiny in invalidating a North Carolina redistricting scheme that bolstered African-American voting power by drawing two bizarrely-shaped majority-minority districts. The Court held race may be used in redistricting only in a narrowly tailored fashion to further a compelling government interest. *Id.* at 632. Recognizing Appellants' coalition districts' claim would significantly increase the role of race in redistricting:

> The creation of coalition districts arguably forces jurisdictions to consider race more stringently than does the creation of majority-minority districts, because creating viable coalitions requires jurisdictions to engage in highly detailed analyses of racial bloc voting and racial crossover voting. As such, the use of coalition districts to achieve section 5 compliance will likely force a court to invoke strict scrutiny under *Miller v. Johnson*. 515 U.S. 900, 916 (1995) (noting that strict scrutiny must be invoked where the plaintiff can demonstrate that the legislature "subordinated traditional race-neutral districting principles"). Zibel, Daniel A., *Turning the Page on Section 5: The Implications of Multiracial Coalition Districts on Section 5 of the VRA*, 103 MICH. L. REV. 189, 214, n. 92.

With or without the bizarrely-shaped districts that were the manifestation of race-consciousness in *Shaw*, the injury to non-minority voters is even clearer here. Appellants' proposed rule would deny non-minority voters an equal opportunity to achieve their desired outcomes and force a state to maintain congressional districts even as they become increasingly unrepresentative of the state's voters.

In fact, the adoption of Appellants' theory that coalition districts must always be preserved as originally drawn would result in the violation of minorities' voting rights who vote contrary to the majority of minorities and live in districts where minorities' votes are decisive. For example, under Appellants' theory, minority Republicans, other than those who live in mostly white areas, would never be able to elect the candidate of their choice for any office, as their districts would be perpetually gerrymandered to keep a white Democrat in power so long as 51 percent of blacks provide a margin of victory for the white Democrat, even if a majority of Hispanics preferred a Hispanic Republican.

Furthermore, since there are no congressional findings that Section 2 requires the creation or preservation of minority-influence districts, there is no basis for invoking the enforcement powers of Congress pursuant to the Fourteenth and Fifteenth Amendments, and therefore no trump card to override the Constitution's principles of federalism. *See, Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (Congress had exceeded its power to regulate state elections, because "no legislative findings" that states were using the age requirements to discriminate based on race). While this case concerns federal elections, Section 2 applies to state and local elections, which militates against extending it and thereby creating a constitutional question concerning the balance of federal and state powers. The constitutional question is particularly weighty because, unlike Section 5, Section 2 is not confined to remedial circumstances and has no termination provision, resulting in endless federal supervision of state and local elections. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court, in striking down the Religious Freedom Restoration Act, elucidated the remedial parameters that circumscribe Congress' enforcement powers under the Fourteenth Amendment. *Id.* at 519. In *Lopez v. Monterey County*, 525 U.S. 266, 283-284 (1999), the Court expressly affirmed the *Flores*' holding limiting congressional enforce-

ment power under the Fourteenth and Fifteenth Amendments to remediation. While the *Lopez* Court upheld the constitutionality of Section 5, it emphasized that, because of its limited scope and bailout procedures, Section 5 "burdens state law only to the extent that that law affects voting in jurisdictions properly designated for coverage." *Id.*

Conversely, Section 2 is not congruent with remedial congressional enforcement power under the Fourteenth and Fifteenth Amendments, because it applies even to jurisdictions with no history of discrimination and has no bailout provision. Although we do not agree that the 1982 amendments to Section 2 completely eliminated the intent requirement[8], to the extent it has, Section 2 has become further unmoored from Congress' enforcement authority under the Fourteenth and Fifteenth Amendments, since claims under the Fourteenth amendment and the Fifteenth Amendment require proof of discriminatory intent. *See, Rogers v. Lodge*, 458

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[8] Representative Rodino, the House sponsor of the 1982 amendment, indicated that the amendment would not change the law with regard to proportional representation by creating an effects test. *See*, H.R. 3112, 97th Cong., 1st Sess., 127 CONG. REC. H1383 (daily ed. Apr. 7, 1981). In our view, for discriminatory results to be actionable under Section 2, they must be traced to ongoing purposeful discrimination, or at the very least, the present effects of recent purposeful discrimination. Accordingly, even after taking into account the 1982 changes, the Eleventh Circuit has explained that Section 2:

> explicitly retains racial bias as the gravamen of a . . . claim. The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color,' not on account of some other racially neutral cause. *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir.1993) (en banc)).

U.S. 613, 618 (1982) (discussing intent requirement for Fourteenth Amendment and 42 U.S.C. § 1983 claim) and *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality) (discussing intent requirement for Fifteenth Amendment claim). *See also, City of Rome v. United States*, 446 U.S. 156, 213 (1980) (Rehnquist, J., dissenting) (explaining that based on the remedial construction of the Fourteenth and Fifteenth Amendments, Congress' enforcement power over the states extends only insofar as necessary to right a wrong that amounts to a constitutional violation).

C. COURT SHOULD REDUCE, NOT EXPAND, THE USE OF RACE IN REDISTRICTING

We disagree with this Court's jurisprudence beginning with *Thornburg v. Gingles*, 478 U.S. 30 (1986) that has found in Section 2 a requirement for the creation and maintenance of majority-minority districts. The Constitution—and the overwhelming weight of this Court's other precedents in areas such as public contracting and employment and higher education—require that race be entirely excluded from consideration in redistricting, which could now be accomplished by specifying race-neutral parameters for lines drawn by a computer, ideally without reference to preserving existing majority-minority districts.[9] In *Johnson v. DeGrandy*, Justice Kennedy concluded:

> Given our decision in Shaw, there is good reason for state and federal officials with responsibilities related to

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[9] *See, Adarand Constructors v. Pena*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down racial preferences in public contracting). *See, also, Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (invalidating use of racial preferences in public employment). Although we disagree with the Court's holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) that diversity can, under very limited circumstances, be a compelling interest in higher education for the next 25 years, this rationale has no application to redistricting since the use of race tends to result in creating districts that look less like the general population and the alleged educational benefits do not apply to voting.

> redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause. But no constitutional claims were brought here, and the Court's opinion does not address any constitutional issues. *Johnson v. DeGrandy*, 512 U.S. 997, 1031 (1994) (Kennedy, J., concurring).

While Congress intended that superficially race-neutral measures—whether a poll tax or a hypothetical Texas redistricting plan motivated entirely by race that used bizarre line-drawing to create no majority-minority districts—could violate Section 2, there is nothing in the plain language of Section 2 suggesting that the maximum number of a majority-minority districts must be created or preserved, particularly at the expense of race-neutral objectives. *Gingles* and its progeny have led to the brazen use of race to extract political benefits by packing minorities into bizarrely-drawn districts, an unintended consequence of mandating the use of race as a departure from traditional districting principles such as compactness. There is no evidence that minorities are better served by being more concentrated than Anglos.

A jurisprudence more consistent with the plain language of Section 2 and the Constitution would simply require that persons may not be classified or preferred on the basis of race. The Court endorsed a more flexible approach to Section 5 in which majority-minority districts would simply be one means of compliance in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). By recognizing that minority-influence districts could substitute for majority-minority districts in some circumstances, the Court limited its role in the redistricting thicket and discouraged politicians from employing this Court's jurisprudence as a license for race-based packing.

Appellants never identify any legal basis for reconciling the *Georgia v. Ashcroft* holding that majority-minority dis-

tricts can be altered while still obtaining Section 5 preclearance with their claim that minority-influence districts can never be altered under Section 2. The Appellants are asking this Court to convert a voluntary means of compliance with Section 5 into a mandatory requirement under Section 2. Yet, unlike Section 5, Section 2 is not limited geographically or temporally in its application, and a jurisdiction can never extricate itself from federal oversight. Bybee, Keith J., MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 26 (1998). Such an extension of Section 2 would represent an unprecedented expansion in both the Court's role and the use of race in redistricting, creating unintended consequences. For example, incumbent protection of politicians elected in minority-influence districts would be required in redistricting, conferring an entitlement to hold office at the expense of drawing competitive general election districts.

D. FACTORS ENUMERATED BY CONGRESS AND THE COURT, HISTORICAL RECORD, AND RECENT ELECTION DATA WEIGH AGAINST FINDING VIOLATION OF SECTION 2

The "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). This standard and the clear disclaimer of any right to proportional representation in Section 2 make clear that the proper legal touchstone is not the proportionality of results as measured by the number of minority or minority-preferred candidates elected, but the equality of opportunity to vote and run for office.

The Senate Judiciary Committee's report accompanying the 1982 legislation suggested factors to consider when determining if, the operation of an electoral device results in a

violation of Section 2.[10] In *Gingles*, the Court announced a three-prong test for establishing a Section 2 violation. First, the minority group must show it is geographically compact enough to constitute a majority in a single-member district. Second, the minority must show it is politically cohesive. Third, the white majority must vote sufficiently as a bloc to enable it to defeat the minority's preferred candidate. Prongs two and three of the *Gingles* test and the Committee Report factors combine to insert a dynamic element into a Section 2 claim that the Appellants ignore. To put it simply, racial attitudes and voting behavior in Texas in 2006 are not analogous Mississippi in 1965.

In 2004, Texas became a majority-minority state. *See, Texas Becomes Nation's Newest "Majority-Minority" State, Census Bureau Announces*, U.S. Census Bureau News Release, August 11, 2005. By 2030, the Bureau estimates that Texas will be majority Hispanic. Tilove, Jonathan, *Census estimates forecast rise of the Sun Belt Population*, BALTIMORE SUN, May 29, 2005. These demographic realities indicate that the "social conditions" cited in *Gingles* wherein a majority Anglo population wields power to disenfranchise minorities through unfair election procedures are simply not present in today's Texas.

In addition to the sheer power of demographic change recent election results are instructive. First, they are explicitly relevant to the Judiciary Committee factor concerning the election of minorities. Second, recent Texas election results are relevant to both the racial polarization factor stated by the Judiciary Committee and the third prong in the *Gingles* test.

Texas has elected several black statewide leaders who remain in office today: Railroad Commissioner Michael Williams, Supreme Court Chief Justice Wallace Jefferson, and Supreme Court Justice Dale Wainwright. In fact, of the

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[10] *See*, S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

two Hispanics and four blacks nominated to statewide offices by Republicans since 1994, all but one prevailed in the general election, with the winners receiving 63 to 85 percent of the Anglo vote, figures comparable to Anglo Republicans. Bullock, Charles S. and Ronald Keith Gaddie, *Assessment of Voting Rights Progress in Texas, The Project on Fair Representation*, American Enterprise Institute, January 6, 2006, pg. 15, available at http://www.aei.org/doclib/20060106_Vratexas.pdf. Moreover, their success in Republican primaries versus white opponents shows how receptive white Texan voters are to black candidates. In 2002, Wainwright defeated white district judge in the 2002 Republican primary. In the 2002 Republican primary, Jefferson prevailed over his white opponent, garnering 62 percent of the vote. In the 2000 Republican primary, Williams trounced his white opponent with a commanding 80 percent of the vote.

Texas has also elected numerous Hispanics to statewide office. In 2004, Hispanic Railroad Commissioner Victor Carillo won with some 63 percent of the vote over a white opponent in the Republican primary. In 2000, Supreme Court Justice Al Gonzales defeated a white opponent in the Republican primary with 58 percent of the vote. Tony Garza was elected Railroad Commissioner, defeating a white former Congressman in the 1998 Republican Primary. In 1994, Hispanic Democrat Attorney General Dan Morales was re-elected statewide with 53.7 percent of the vote, outperforming numerous white Democratic incumbents. In that same election, Hispanic Democrat Texas Supreme Court Justice Raul Gonzalez was re-elected with an overwhelming 81.3 percent of the vote, suggesting he was the candidate of choice for all racial groups.

Thousands of blacks and Hispanics serve in the Legislature and local offices, including recent Mayors of the state's four largest cities: Houston, San Antonio, Dallas, and Austin. Professors Charles Bullock and Ronald Gaddie note, "In 1996, Texas boasted almost 1,700 Latinos in public office

and by 2003 that number had swelled to almost 2,000, one of whom held a statewide post." *Bullock and Gaddie* at p. 9. This is twice the number of Hispanic elected officials in California, even though Texas has a substantially smaller population. *Id.* at 9. Currently, 27 members of the 150-member House of Representatives are Hispanic and 14 are black. *Bullock and Gaddie* at p. 27, Table 7. Of the 31 members of the State Senate, eight are either black or Hispanic. *Id.*

Indeed, the success of Dallas Mayor Ron Kirk shows, along with Morales and Gonzalez, that it is not just Republican minority elected officials who have performed well among white voters. In 1999, 74 percent of Dallas voters—ostensibly a majority of blacks and whites—voted to re-elect Mayor Ron Kirk over a white opponent. Jalonick, Mary Clare, *Accentuate the positive*, CAMPAIGNS & ELECTIONS, May 1, 2002. However, the lack of black and Hispanic voting cohesion was demonstrated when Kirk was first elected in 1997 with 97 percent of the black vote, 42 percent of the white vote, and only 14 percent of the Hispanic vote. Shepard, Scott, *Disharmony in Diversity: Political Alliances Between Hispanics and African-Americans Are Rare in Dallas*, ATLANTA JOURNAL-CONSTITUTION, August 31, 1997.

The lack of black and Hispanic voting cohesion was also evident in the 1998 Democratic primary for Agriculture Commissioner between Anglo Pete Patterson and Hispanic Ernesto DeLeon. In Dallas County, DeLeon is estimated to have received 80.8 percent of the Hispanic vote but only 23.4 percent of the black vote and 36.3 percent of the Anglo vote. *Bullock and Gaddie* at p. 33, Table 10. Similarly, in Tarrant County, DeLeon garnered approximately 77.8 percent of the Hispanic vote but only 17.8 percent of the black vote and 33.3 percent of the Anglo vote. Also, in the 1998 Democratic primary for Attorney General, black candidate Morris Overstreet, facing two Anglos, received roughly 64.1 percent of the black vote in Dallas County, but less than 5 percent of the Hispanic and Anglo votes. In Tarrant County, Overstreet

performed similarly, garnering 73.7 percent of the black vote, but less than 1 percent of Hispanic and Anglo votes.

The lack of cohesion among Texas blacks and Hispanics has also been apparent in Houston. In 1997, Rob Mosbacher, a white Republican, received 54 percent of the Hispanic vote in his unsuccessful campaign against black Democrat Lee Brown, who won nearly all the black vote. Rodriguez, Lori, *Group hopes to mobilize Houston's Hispanics to vote*, HOUSTON CHRONICLE, September 23, 2001. In 2001, Brown won re-election over Republican Hispanic challenger Orlando Sanchez by 51 to 49 percent. Sanchez won 72 percent of the Hispanic vote and 90 percent of the Republican vote while Brown collected 93 percent of the black vote. Hamilton, Kendra, *A tale of three cities*, BLACK ISSUES HIGHER EDUC., Vol. 19, Issue 6, September 26, 2002; Williams, John, *Poll: White widening gap over Sanchez*, HOUSTON CHRONICLE, December 5, 2003.

These results show that blacks and Hispanics are not a cohesive voting bloc, and that whites are often more likely than Hispanics to join with blacks to elect a black candidate. Also, Hispanics themselves are not a cohesive voting bloc. In Houston, where Hispanics have supplanted Anglos as the largest ethnic group, the proportion of non-Mexican Hispanics jumped from 20.4 percent in 1990 to nearly 28 percent in 2000. Rodriguez, Lori, *Shift Seen in Houston's Hispanic Growth*, HOUSTON CHRONICLE, August 17, 2003. In Austin, the percentage increased from 12.7 to 23.3 while in Dallas it grew from 12 to 17. *Id.* Texas state demographer Steve Murdock notes, "What's significant is that Hispanics have been in the 90 percent of Mexican origin for decades, and now we're seeing an abrupt shift and increasing diversification. These newcomers may have much more in common with other new immigrants than with Hispanics who have been here for generations." *Id.* One indication of the divergent political traditions among various Latino groups is that fourteen percent more Cubans identify themselves as

Republicans than as Democrats. *National Annenberg Election Survey of 2000*, available at http://www.annenberg publicpolicycenter.org. Hispanics' socioeconomic status also has a profound effect on their voting preferences. Gallup polls show that Hispanics with household incomes over $50,000 are twice as likely to be Republicans as other Hispanics. Kasindorf, Martin, *Parties target Hispanics in 4 battleground states*, USA TODAY, October 26, 2004.

In addition to electing blacks and Hispanics, Texas minorities have frequently elected their white candidates of choice on a local level, and on the state level prior to the Republican dominance that began in the middle of the 1990's. Even after this realignment, Hispanics may still have elected a candidate of their choice. The Texas Poil just before the November 1998 election found Governor Bush led his Democrat opponent 49 to 41 percent among Hispanics. Ratcliffe, R.G., *Texas Poll continues to predict major victory for Bush*, LAREDO MORNING NEWS, November 1, 1998. The percent of Southern Hispanics who voted for President Bush increased from 41 percent in 2000 to 55 percent in 2004. Moscoso, Eunice, *Bush Makes Gains With Hispanic Men; Hispanic Southerners*, Cox News Service, December 22, 2004.

Many of the factors cited by the Judiciary Committee are nonexistent in today's Texas. For example, in recent Texas elections, the subtle racial appeals referenced by the Committee have been absent. Other factors cited by the Committee are similarly inapplicable to today's Texas, including unusually large election districts, majority-vote requirements, prohibitions against bullet voting, and the exclusion of members of the minority group from candidate slating processes. While there are racial disparities in education, employment, and health, they do not prevent minorities from participating effectively in the political process.

Given the role of history cited *Gingles* and the Judiciary Committee, the Court should take judicial notice that Hispan-

ics have never been systematically denied the right to vote in Texas. In fact, three of the signers of the Texas Declaration of Independence were of Mexican descent. *See, HANDBOOK OF TEXAS ONLINE, S.V. "MEXICAN TEXAS"*, available at www.tsha.utexas.edu/ (visited January 15, 2006). Texas Hispanics, unlike blacks, have not been subject to segregation or Jim Crow laws. Chavez, Linda, OUT OF THE BARRIO, ch. 2 (1991). "There is no history either of *de jure* discrimination against Mexican Americans in education at any level in Texas or of *de facto* discrimination against Mexican Americans by the [University of Texas] law school." *Hopwood v. Texas*, 78 F.3d 932, 955, n. 50 (5th Cir. 1996). Former Attorney General Dan Morales observed, "There is very, very close to unanimity between the majority culture and political tradition and the Hispanic community." *Perspective*, ALBANY TIMES-UNION, September 15, 1991.

State-sponsored discrimination against blacks in Texas has long been consigned to the dustbin of history. Because black voter participation was sufficiently high in Texas, the trigger mechanism in Section 4 of the VRA of 1965 did not implicate the state. Blum, Edward & Abigail Thernstrom, *Executive Summary of the Bullock-Gaddie Assessment of Voting Rights Progress in Texas*, The Project on Fair Representation, American Enterprise Institute, January 6, 2006, pg. 8, available at http://www.aei.org/doclib/20060106_Vratexas.pdf. In fact, in the five most recent Texas elections, African-Americans have turned out to vote at higher rates than Anglos. *Bullock and Gaddie* at p. 8. Black turnout in the 2004 election was 55.8 percent in Texas compared with 50.6 percent for whites. *Id.* at 22. Similarly, from 1992 to 2004, the share of the Texas registrants who have Spanish surnames has increased by more than 40 percent so that the proportion of registered voters with a Spanish surname is only slightly less than the share of the state's citizen voting age population that is Hispanic. *Id.* at 19. The rise of Hispanic political participation in Texas was illustrated when the two Democratic

gubernatorial candidates in 2002—Tony Sanchez and Dan Morales—conducted a primary debate that was partly in Spanish. Axtman, Kris, *Qué es esto: ¿A Texas debate in Spanish?*, CHRISTIAN SCIENCE MONITOR, March 1, 2002.

Ron Kirk candidly observed in during his 2002 Senate campaign, "Frankly, the challenge in Texas is not to get people to vote for a black, but to get them to vote for a Democrat." Kiker, Douglas, *Just the Ticket in Texas?*, CBS News, June 27, 2002. Statistics prove Kirk's point:

> Candidate race is not a factor in the decline of support for Democratic candidates in the 66 statewide contests from 1992-2004 where Democrats stood. A test of the difference of mean vote by race of the candidate—for the overall vote and the Anglo vote share—shows that differences in the vote shares for Anglo, African-American, and Hispanic candidates are insignificant (F=.285 and .940, respectively). When one subjects the percentage of the Anglo vote captured by Democrats to a multivariate test, controlling for the race and ethnicity of the Democratic candidate and a temporal counter set to 0 in 1992 and increasing by a value of +1 for each passing year, the decline of the Anglo vote for Democrats is not significantly related to a candidate's ethnicity. African-American and Hispanic candidates fare no worse than Anglo Democrats. Indeed, the coefficients for black and Hispanics candidates are actually positive. *Bullock and Gaddie* at p. 14.

In sum, insufficient racial polarization exists in the Texas electorate to implicate the third prong of the *Gingles* test.

Appellants do not allege a lack of responsiveness by elected officials to minorities, a factor cited by the Judiciary Committee. It cannot be presumed that Republican elected officials are less concerned with minority needs than Democrats. NAACP Chairman Kweisi Mfume called for greater competition by both parties for the black vote, stating: "And yes, 34 years after the assassination of Dr. Martin Luther

King, we still have a society where some in the Democratic party take our vote for granted and some in the Republican party too often refuse to campaign for it." *See,* Mfume, Kweisi, *2002 NAACP Convention Address*, July 8, 2002.

Finally, Texas minorities do not suffer an "inequality in the opportunities to elect their preferred representatives." *Gingles*, 478 U.S. at 47. In Texas, the average minority voter lives in a congressional district with fewer registered and actual voters than the average Anglo voter. In part because districting is based on raw U.S. Census population data that includes children, illegal immigrants, and felons—all of whom are ineligible to vote—the average minority Texan actually casts a more heavily weighted vote than the average Anglo Texan. This should be considered in evaluating whether a particular redistricting plan disadvantages minorities.

In 2004, in the eight Texas majority-minority congressional districts, an average of 153,185 people voted for Congress. *See,* Texas Secretary of State, *2004 Election Results*, available at http://elections.sos.state.tx.us. In the remaining 24 congressional districts, an average of some 238,838 votes were cast for Congress. Accordingly, there were 56 percent more votes cast in the non majority-minority districts. Thus, voters in the majority-minority districts had their votes weighted at 1.56 while their counterparts were weighted at 1.00. Section 2 does not confer upon a group the right to proportional representation commensurate with the racial and ethnic makeup of the general population, but rather a guarantee of an equal opportunity to influence the political process that protects individual voters from dilution of their voting strength based on racial or ethnic background. The greater weight of Texas minorities' votes in congressional elections offsets any countervailing effects on minority influence attributable to redistricting.

E. Section 2 of the VRA Provides No Entitlement to the Creation or Maintenance of Minority-Influence Districts

Under Plan 1374C, there are at least as many majority-minority districts as under the 1991 gerrymander. Including District 9, which has a majority-minority population and a 48 percent black voting-age population, there is one more majority-minority district after 1374C. The redrawn District 9 elected black Democrat Al Green in place of white Democrat Chris Bell. Green praised the composition of the district, noting, "The 9th District is uniquely one of the most culturally rich and ethnically diverse districts in the country. With its large African-American, Hispanic-American, Asian-American, and immigrant population, the 9th Congressional District is a microcosm of the nation." *See*, http://www.house.gov/algreen/district.shtml.

Under Plan 1374C, there are eight majority Latino districts based on voting age population, five of which elect Hispanics and seven of which elect the Hispanic candidate of choice in general elections. *Bullock and Gaddie* at pp. 10-11. The only majority Latino district in which the Hispanic candidate of choice in the general election does not prevail is District 23, which elects Hispanic Republican Henry Bonilla with as much as 43.3 percent of the Hispanic vote. *Id.* at p. 19, citing Katz, Jonathan N., *Report on Texas Congressional Redistricting: Minority Opportunities and Partisan Fairness*, submitted in *Del Rio v. Perry*, 2001.). Counting District 23, some 25 percent of Texas' congressional districts are now majority Latino. Even if District 23 is excluded, the 21.8 percent of majority Latino districts is comparable to the 22.3 percent of the Texas voting age population that is Hispanic. *Bullock and Gaddie* at p. 15. Additionally, after Plan 1374C, Texas has three congressional districts occupied by African-Americans. Given that Texas has majority-minority districts for both blacks and Hispanics commensurate with their share

of the state's voting age population, there is no retrogression in the number of majority-minority districts.

Appellants therefore seek an unprecedented expansion in the scope of Article 2 that would create a judicial entitlement for white Democrats who rely on minority votes for their margin of victory to have their districts cryogenically preserved even as the electorate evolves through redistribution of population and the realignment of partisan identification. The panel properly concluded: "Plaintiffs' understandable efforts to freeze this 'coalition' by locating some duty under § 2 not to redraw the district is a transparent effort to use race as a shield from a partisan gerrymander when the district itself was a child of identical efforts to gerrymander." *Session v. Perry*, 298 F.Supp.2d 451, 481 (E.D. Tex. 2004). In many competitive districts around the country, minority voters constitute a sufficient portion of the electorate to sway the election if they vote entirely or predominantly for one candidate. Section 2 does not provide minorities in all of these districts a statutory right to always have their preferred candidate prevail, but simply guarantees an equal opportunity to vote. The Fourth Circuit so reasoned in rejecting such a claim:

> The argument that a coalition of black and white voters may claim that a redistricting plan dilutes their *combined* ability to elect candidates confuses the purpose of Section 2. The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability 'to elect its candidate of choice on an equal basis with other voters.'" *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). . . . . Furthermore, any construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are

not so defined. *Hall v. Virginia*, 385 F.3d 421, 430-31 (4th Cir. 2004).

Appellants ignore important distinctions between minority-influence districts and majority-minority districts. Unlike majority-minority districts, in minority influence districts, minorities' true candidate of choice will often lose the primary or may not even run. By their nature, coalitional districts involve political horse-trading in the primary where varying factions must compromise. The three-judge redistricting panel in South Carolina concluded of minority-influence districts with minority populations of 25-40%: "With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a white Democrat can usually defeat a black Democrat in the primary election and then use the black vote to defeat any Republican challenger in the general election." *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643, n. 22 (D.S.C. 2002). That court found drawing such districts "is, therefore, an inherently politically based policy" not mandated by the VRA. *Id.*

Appellants focus on District 24, even though it had only a 21.4 percent black voting age population and a 23 percent Hispanic citizen voting-age population, and no black candidate had ever filed against Congressman Frost in the Democratic primary. Blacks and Hispanics in District 24 have not exhibited the voting cohesion required by *Gingles* for them to be treated as a single minority group. The panel expressly so concluded, noting "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." *Session v. Perry*, 298 F.Supp.2d 451, 478 (E.D. Tex. 2004). In the 1998 Democratic primary for Attorney General, black candidate Morris Overstreet garnered 74.3 percent of the black vote in District 24, but Hispanics and Anglos in the district voted overwhelmingly for his white opponent Jim Mattox. *See*, Lichtman Report, Def. Exh. 22.

The panel correctly concluded that "if § 2 protection is afforded to old District 24 despite the absence of the *Gingles* factors, the VRA begins to protect political affiliation and not race." *Session v. Perry*, 298 F.Supp.2d at 484.

Likewise, District 25, which was redrawn by Plan 1374C to become District 9 now represented by Congressman Al Green, did not perform for blacks under the 1991 gerrymander. In the 2002 Democratic primary, 69 percent of black voters chose former Houston City Councilman Carroll Robinson, an African-American, but Robinson lost to Anglo Chris Bell, as Bell received the bulk of white and Hispanic support. *See*, Lichtman Report, Table 17.

The Appellants contend Plan 1374C violates Section 2 by redrawing purported minority-influence districts in Central and East Texas, formerly districts 1, 2, 4, 9, 10, 11, and 17. They concede the State had no obligation to create these districts, but argue they should now be impregnable. The panel disagreed, noting none of them had a citizen voting age population of more than 22 percent of a single minority group and that, even if blacks and Hispanics were combined despite lack of cohesion, none of these districts approached majority-minority status. *Session v. Perry*, 298 F.Supp.2d at 485-86.

F. Section 2 Did Not Require Creation of Seventh Hispanic-Majority District

The panel properly concluded that the population figures do not require the creation of another Hispanic-majority district. Even if disputed District 23 is excluded, the 21.8 percent of majority Latino districts under Plan 1374C is comparable to the 22.3 percent of the Texas voting age population that is Hispanic. The panel determined: "The GI Forum Appellants have shown neither that seven districts can be drawn, meeting the threshold *Gingles* requirements, that have a majority of Hispanic citizen voting age population, nor that all such districts, if they could be drawn, would function effectively as Latino opportunity districts." *Session v. Perry*, 298 F.Supp.2d

at 496. The panel found that the map submitted by the Appellants envisaging a seventh district (1385C) required bizarre line-drawing that contravened traditional districting principles.

Furthermore, to squeeze in a seventh Hispanic-majority district, the panel observed that one of the seven districts would have had only a 50.3 percent Hispanic citizen voting age population with another at 56.9 percent. Democratic Congressman Rubén Hinojosa testified that "along the Texas border region from Brownsville to McAllen to Laredo to El Paso in order to win an election, you need to have about 57, 58% or higher Hispanic voter age population because of the low turnout." *Id.* at 495, n. 134. That Congressman Henry Bonilla's former District 23 did not elect Hispanics' candidate of choice is indicative of this point.

G. Redrawing of District 23 Did Not Constitute Retrogression in Violation of Section 2

The Appellants' claims concerning changes to District 23 must be rejected. First, District 23 was not electing the minority candidate of choice, although it did elect a Hispanic Republican. Second, the changes to District 23 were offset by the creation of majority-Hispanic District 25. While the Appellants ask this Court to examine District 23 in a vacuum, *Georgia v. Ashcroft* held otherwise with respect to a Section 5 claim:

> To determine the meaning of "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," the statewide plan must first be examined as a whole: First, the diminution of a minority group's effective exercise of the electoral franchise violates § 5 only if the State cannot show that the gains in the plan as a whole offset the loss in a particular district. Second, all of the relevant circumstances must be examined, such as minority voters' ability to elect their candidate of choice, the extent of the minority group's opportunity to participate

> in the political process, and the feasibility of creating a nonretrogressive plan. *Georgia v. Ashcroft*, 539 U.S. 461,463-464 (2003).

Accordingly, Appellants are foreclosed from claiming the loss of a majority-minority district cannot be offset by creating one in another part of the state.

H. FACTS DO NOT SUPPORT *SHAW V. RENO* RACE-BASED GERRYMANDERING CLAIM

We agree that *Shaw* and the Equal Protection clause prohibit drawing district lines primarily based on race.[11] However, the panel correctly concluded that the facts here reveal no such impermissible use of race.

The panel properly relied on *Washington v. Davis*, 426 U.S. 229 (1976) and its progeny for the critically important principle that an adverse impact alone does not establish a racial discrimination claim without evidence of a discriminatory purpose. *Id.* at 642. The lower court also discussed *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) in which this Court held that the denial of a zoning request was not unlawful unless it was motivated by a discriminatory purpose, even though it adversely affected minorities. *Id.* at 469-70. Finally, the panel drew from *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) in which this Court ruled that a Massachusetts statute preferring veterans for civil service positions did not unlawfully discriminate against women because few women happened to qualify. The *Feeney* majority wrote:

> [I]t would thus be disingenuous to say that the adverse consequences of this legislation for women were

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[11] Amicus briefs urging this Court to the bizarrely-shaped, race-based districts at issue in *Shaw* were filed by Appellants or groups aligned with them: the Democratic National Committee, Lawyers' Committee for Civil Rights Under Law, and the NAACP Legal Defense and Educational Fund, Inc. We encourage former supporters of race-based public policies to embrace colorblind approaches, but the excessive use of race in redistricting is no more justifiable depending on which political party benefits.

> unintended, in the sense that they were not volitional or in the sense that they were not foreseeable, nevertheless, "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. . . . *Id.* at 257.

There is no constitutional or statutory basis for loosening this discriminatory purpose requirement. Whether it is the Fourteenth Amendment or the VRA, a guarantee of equal opportunity, not proportional results, is the touchstone of the plain language of these provisions. To be actionable, disproportionate results must be traceable to ongoing purposeful discrimination, or at the least, the present effects of past discrimination by the entity in question. *See, Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir.1992), cert. denied, 115 S.Ct. 2001 (1995)) (holding University of Maryland's scholarship program exclusively for blacks could not be sustained as a constitutionally permissible remedial measure absent sufficient showing of present effects of past discrimination by the University). Diluting the discriminatory purpose requirement would augur an avalanche of dubious litigation, as hypothetical Appellants could establish as a matter of law that the National Hockey League discriminates against blacks, Hispanics and Asians and that nursing schools unlawfully discriminate against men. The mere fact that all societal outcomes do not occur in exact proportion to the percentages of various minority groups in the population does not, taken alone, prove that a group was disfavored in the process.

Applying this sound body of law, the panel found the evidence showed race played no role in the drawers' decisions. They concluded that backers of Plan 1374C sought to advance Republican interests and any negative impact on minorities simply flowed from the fact that most minorities happen to be Democrats. For example, after thoroughly

reviewing the testimony of credible witnesses, the panel rejected Appellants' claim that minority voters were placed in District 26 instead of District 25 on the basis of race:

> [W]e find that including the large Democratic area of southeast Tarrant County in District 26 was the sole product of political give-and-take by legislative members over their own state districts and the effort to not create another Democratic district. The actions were not taken because of race; they were taken in spite of it. *Session v. Perry*, 298 F.Supp.2d at 4'/2.

The panel also found that "ethnicity did not predominate in the numerous decisions involved in the placement of the district lines in Congressional Districts 28, 15, 25, and 27." *Id.* at 490. The notion that Plan 1374C embodies a discriminatory purpose is belied by the fact that Vilma Luna, a Hispanic Democrat; Ron Wilson, a black Democrat[12]; and Elvira Reyna, a Hispanic Republican, all voted for it. *House vote on redistricting plan*, AUSTIN AMERICAN-STATESMAN, October 10, 2003. Not a single minority member of Congress was unseated as a result of Plan 1374C and not a single performing majority-minority district was eliminated.

Appellants seek to assign a racial purpose to the redrawing of District 23. However, the lower court found the redrawing of this district was motivated by mapmakers' desire to improve Congressman Bonilla's re-election prospects and that this required splitting Laredo and Webb County. *Session v. Perry*, 298 F.Supp.2d at 490. Given that all incumbent Republican Congressmen were protected and none were paired under Plan 1374C, neither Congressman Bonilla nor his district were treated differently based on race. In any event, the district was not performing as a minority-majority district. Consequently, Appellants' challenge to District 23 can neither succeed as a *Gingles* claim or a *Shaw* claim.

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[12] Wilson successfully led the fight to make Martin Luther King Jr. Day a state holiday. *See*, Nissimov, Ron, *Ron Wilson: a man of contradictions, controversy*, HOUSTON CHRONICLE, January 11, 2004.

While Appellants attempt to analogize District 23 to the districts at issue in *Shaw*, they are easily distinguishable. First, neither District 23 nor any other district in Plan 1374C is shaped nearly as bizarrely as the districts at issue in *Shaw*. Second, the two districts in *Shaw* resulted from revisions to a legislatively approved map that only occurred because North Carolina's Attorney General ordered that a second majority-minority district be created. Finally, throughout the *Shaw* litigation, the State did not dispute that the purpose of the two snake-shaped districts that ignored traditional districting principles was to divide voters based on race. Rather, the State asserted that their racial purpose was benign and, because the Appellants were white, they had no cognizable claim under the VRA.

CONCLUSION

This Court should not give partisans battling over their political fiefdoms more legal ammunition to use race as a weapon by opening another front in Section 2 litigation. Doing so would obliterate the clear statutory language, every applicable precedent, and the panel's carefully considered factual findings. To fill the void, Appellants ask this Court to erect a race-based house of cards from which politicians will deal more litigation from the bottom of the deck, using race as their ace in the hole to trump traditional districting principles. With its decisions in *Shaw v. Reno* and *Georgia v. Ashcroft*, this Court has wisely retreated from a rigid jurisprudence that has too often served as an enabling device for politicians to draw districts based first and foremost on race. Rather than injecting race further into redistricting by making so-called influence districts inviolate, the Court should continue to move away from formulaic race-based requirements and towards a jurisprudence that heeds the race-neutral vision that animated Section 2 and the Reconstruction Amendments and recognizes the remarkable progress that Texas and the nation have made towards achieving this noble goal.

Respectfully submitted,

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Nos. 05-204, 05-254, 05-276, 05-439

JAN 10 2006

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees

TRAVIS COUNTY, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

EDDIE JACKSON, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

GI FORUM OF TEXAS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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INTERESTS OF THE *AMICUS CURIAE*

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. Through the Voting and Representation Project, which is part of our Democracy Program, the Brennan Center seeks to protect the right to equal electoral access and full political participation. The Brennan Center takes an interest in this case because it implicates voters' ability to have a meaningful voice in their government in light of increasingly sophisticated gerrymandering techniques, and because it presents the specter of an escalating war of mid-decade "re-redistrictings" that will further undermine the responsiveness of representatives to those whom they purport to represent. The Brennan Center submitted briefs on related issues in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), as well as a brief supporting an application for a stay the first time the current cases were appealed to this Court.[1]

SUMMARY OF ARGUMENT

Simply put, this case arises out of perhaps the most notorious, even scandalous, partisan gerrymanders of the past half century. This redistricting had no purpose other than partisan gerrymandering. No one even pretends to assert that it had any other purpose. It was pushed through the state legislature on entirely partisan grounds just two years after the last, constitutionally required reapportionment. This mid-decade

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[1] No party's counsel authored any part of this brief. No person or entity other than *amicus* and counsel contributed monetarily to preparing or submitting the brief. Letters from all parties' counsel consenting to the filing of this brief have been lodged herewith.

re-redistricting fails constitutional muster. If it does not fail, it is hard to imagine what would.

It fails even after the decision in *Vieth*. If the *Vieth* plurality and dissenters agreed on nothing else, they agreed on what the case was about. The author of the plurality opinion noted that eight of the nine Justices agreed that politics is a constitutional redistricting criterion "so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting). The *Vieth* dissenters did not disagree; after all, two of them had opined that while *some* intent to gain political advantage was inevitable, "the issue is one of how much is too much." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting).

How far is too far? How much is too much? Whatever the range of possible answers is, it is plain that 110% must be too much. That is the weight that one of the re-redistricting's architects assigned to political gain for Republicans when asked about the legislature's motives. *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex.) (noting that "political gain for Republicans was 110% of the motivation for the Plan"), *vacated in five separate orders*, 125 Sup. Ct. 351-52 (2004). The state has contended, and the District Court found, that the re-redistricting was undertaken purely for political advantage. This Court need not decide whether 51%, or 75%, or 90% is too much; when the impermissible purpose of harming voters with disfavored viewpoints is not leavened with any legitimate state purpose, the state has violated the Constitution.

In many respects, this case is not a typical redistricting case of the sort considered by this Court several times in recent decades. It arises out of singular – and distinctly distressing – circumstances. Ordinary post-census redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the "one person, one vote" guarantee. The mixture of motives

that attends decennial redistricting—partisanship, incumbent protection, eliminating mal-apportionment, and so on—may seem to complicate the formulation of "judicially manageable standards" for determining whether the resulting map is so badly skewed towards one faction as to violate the Constitution. *See Baker v. Carr*, 369 U.S. 186, 226 (1962). This case, accepting the District Court's findings (and the state's own contentions), involves no such mixed motives. It requires only a narrow, judicially manageable rule: state action that is admittedly and openly taken *solely* for partisan advantage is iliegal.

In short, 110% is too much.

ARGUMENT

I.
The Constitution Establishes a Representative Democracy Incompatible with State Action Designed to Disadvantage Citizens with Disfavored Political Opinions.

Representative democracy, protected by federalism and the separation of powers as well as by the Bill of Rights and later amendments, is the essence of the Constitution. Our foundational text, particularly as amended, enshrines two principles: the right of the people to participate as equals in the project of self-governance; and the necessity for representatives to be accountable to their electors. The Texas re-redistricting clashes with both of these principles.

A. Constitutional Structure.

The Court has attended to the Constitution's structure, as well as the text of specific clauses, in adjudicating the division of power both among the branches, *see, e.g., INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of

the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) ("[T]he literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the . . . structural imperatives of the Constitution as a whole."), and between the federal and state governments, *see, e.g., Alden v. Maine*, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); *Fed. Maritime Comm'n v. S. Car. State Ports Auth.*, 535 U.S. 743, 754 (2002) (applying "the sovereign immunity embedded in our constitutional structure").

The most fundamental division of power in our democracy—between the government as a whole and the people from whom it derives all legitimate authority—similarly suffuses the Constitution. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). The Framers included in the text numerous structural elements to give effect to the popular will. *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 1 (requiring periodic election of House members by "the people"); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

Not only the original Framers, but those who have followed, have focused their attention on preserving democratic self-governance. Of the 17 amendments adopted after the Bill of Rights, 12 deal with the democratic process or the government's accountability to the people. The Fourteenth

Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and conditions states' representation in Congress on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments implement equal universal suffrage by banning voting discrimination on the basis of race, sex, wealth, or youth; provide for direct popular election of Senators; and permit residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments provide for separate elections of the President and Vice-President, limit a lame-duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in time of Presidential disability. The Twenty-Seventh Amendment enforces accountability by forbidding Members of Congress from enjoying self-enacted pay raises without first standing for re-election.

Thus, the Constitution views every American citizen as a member of a self-governing community of political equals. In pursuit of that vision, it guarantees to each citizen the right to participate in democracy through voting, running for office, and fair representation. It also guarantees that the government will remain accountable to the people. It is this normative vision of representative democracy that underlies *Baker* and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). It is this vision that is desecrated when a state openly, admittedly, and intentionally deprives citizens who have expressed disfavored viewpoints from participating as political equals in our representative democracy.

One would think that the principle of state neutrality among citizens of different political persuasions ought to be uncontroversial.

> If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.

Vieth, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The question should therefore be, not whether the Constitution permits a state to do what the Texas legislature set out to do, for surely it does not. The question is whether by acting in accordance with Justice Kennedy's hypothesized enactment but without adopting the enactment itself, a state can get away with its constitutional violation because courts cannot define a judicially enforceable rule giving effect to the Constitution's command. For, as Justice Kennedy went on to point out, pursuing the same outcome by different means does not render the impermissible permissible. At most, it makes the violation irremediable:

> If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive.

Id.[2] While four Justices concluded in *Vieth* that no judicially manageable standard could be crafted in the context of regular decennial redistricting (a conclusion with which we respectfully disagree), that problem does not affect this case, for reasons discussed in Point III below. Whatever the difficulties in other contexts, this particular assault on our constitutional structure can be averted by the judiciary.

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[2] Justice Kennedy's description might be applied to the Democratic gerrymander of Georgia, which was struck down because the party in power did not quite manage to act "still in accord with one-person, one-vote principles." *See Cox*, 542 U.S. 947.

B. Guarantee Clause.

The national commitment to representative democracy is not embodied only in the Constitution's structure, but in its text, perhaps most starkly in the national government's guarantee to every individual state of a republican form of government. Like the Guarantee Clause of the federal Constitution, *see* U.S. Const. art. IV, § 4, the Texas Constitution commits the state to republicanism.

> All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

Tex. Const. art. I, § 2. The Guarantee Clause, which is directly relevant to elections for representatives in *state* governments, does not apply directly to Texas's districts for the *federal* House of Representatives. It serves, however, as yet another brick in the constitution's republican edifice. It underscores what should already be apparent: the Texas redistricting is at odds with the Constitution's very core.

Accountability of representatives to the people is the touchstone of republican government. *See Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (Tex. 1982) ("[A] fundamental principle associated with our republican form of government is that every public officeholder remains in his position at the sufferance and for the benefit of the public, subject to removal from office by edict of the ballot box . . . ."); *accord People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242 (Colo. 2003) ("A 'fundamental axiom of republican governments' . . . is that there must be 'a dependence on, and a responsibility to, the people, on the part of the representative,

which shall constantly exert an influence upon his acts and opinions, and produce a sympathy between him and his constituents.'") (quoting Joseph Story, *Story's Commentaries on the Constitution* § 300 (1833)).

Permitting a partisan state legislative majority—rather than the people—to select House representatives would fly in the face of the Framers' design. That conclusion is underscored by the Constitution's command that Members of the House be "chosen . . . by the People of the several States." U.S. Const. art. I, § 2, cl. 1; *see also Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (referring to "the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention"); *The Federalist* No. 52, at 256 (James Madison) (Terence Ball ed., 2003) ("[I]t is particularly essential that the [House] should have an immediate dependence on, and an intimate sympathy with the people."). *Cf.* U.S. Const. amend. XVII (requiring direct popular election of Senators).[3]

If viewpoint discrimination is the Texas mid-decade redistricting's cardinal sin, its subversion of government accountability is not far behind. This can be seen most clearly in the context of the largely Republican West Texas districts whose voters stubbornly re-elected Democratic incumbents while mostly voting for Republicans in other races. It is no secret that one of the legislature's main goals in redrawing the lines was to put those Democratic incumbents into different districts from most of their existing constituents.

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[3] This choice was entirely conscious; for the first century-and-a-quarter of the nation's existence, the U.S. Senate was in fact chosen by the various state legislatures. U.S. Const. Art. I, § 3, cl. 1. This practice was so prone to partisan abuse and corruption that the Constitution was amended to provide direct election. U.S. Const. amend XVII.

It is understandable that a Republican legislative majority would be impatient with voters in a half-dozen Republican-leaning districts who choose to retain Democratic incumbents. But the decision whether, and when, to end those representatives' ties with their constituents properly belongs to the people. The extraordinary re-redistricting took that decision away from them and gave it to the legislature, a profoundly anti-republican usurpation of power.

The power grab was not surprisingly, and not inaccurately, characterized in the media as anti-Democrat. But among its most prominent victims are the Republicans of West Texas, whom party leaders punished for their wayward votes by denying them the right to elect representatives of their choice. Another state unsuccessfully tried something similar (though less invidious in that its rule was not viewpoint-based) when it adopted congressional term limits.

> Not the least of the incongruities in the position advanced by Arkansas is the proposition, necessary to its case, that it can burden the rights of resident voters in federal elections by reason of the manner in which they earlier had exercised it. If the majority of the voters had been successful in selecting a candidate, they would be penalized from exercising that same right in the future.

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

The Colorado Supreme Court understood that the kind of mid-decade tinkering undertaken by Texas and also attempted in Colorado undermines republicanism, even putting partisan motivations to one side:

> The framers knew that to achieve accountability, there must be stability in representation. . . . If the

> districts were to change at the whim of the state legislature, members of Congress could frequently find their current constituents voting in a different district in subsequent elections. In that situation, a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents.

Salazar, 79 P.3d at 1242. The heads-we-win-tails-you-lose approach—try to beat opponents at the ballot box and then, if that fails, punish uncooperative voters by taking away their chosen representatives—is the antithesis of the republican government guaranteed by the federal and Texas Constitutions.[4]

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[4] Again, the Colorado Supreme Court appreciated the harm done to the people's interests by severing the links between them and their representatives:

> The frequency of redistricting affects the stability of Colorado's congressional districts, and hence, the effectiveness of our state's representation in the United States Congress. When the boundaries of a district are stable, the district's representative or any hopeful contenders can build relationships with the constituents in that district. Furthermore, the constituents within a district can form communities of interest with one another, and these groups can lobby the representative regarding their interests. These relationships improve representation and ultimately, the effectiveness of the district's voice in Congress.

Salazar, 79 P.3d at 1228. This point was also appreciated by the citizens—Republican and Democratic—of the districts that were separated from the representatives who understood their local interests. *See West Texas Opposition*, Austin American-Statesman, Oct. 15, 2003, at A12 (collecting editorial comment from West Texas newspapers); Clay Robison, *Undecided Texas Lawmakers Feel Pressure over New Redistricting Map*, Houston Chronicle, July 13, 2003 ("[T]he veteran statehouse Republican [Bob Hunter of Abilene] found plenty of time to listen to constituents. They were everywhere, and to a person—Republicans, (cont'd)

C. Elections Clause.

States have no inherent authority over federal elections. Their power to hold elections for federal offices arises from the federal Constitution. *See Cook v. Gralike*, 531 U.S. 510, 522 (2001) . A state cannot exercise any powers with respect to federal elections beyond those delegated by the Constitution. *U.S. Term Limits*, 514 U.S. at 805. This Court has made clear that hamstringing a particular group of candidates is not part of the authority delegated to the states.

When a state exercises its plenary police power, federal courts are appropriately reluctant to intercede. Here, considerations of federalism cut the other way. "There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere." *Id.* at 845 (Kennedy, J., concurring).

States' power to draw congressional district lines stems from the Elections Clause of Article I, Section 4 of the Constitution, which permits states to regulate the "Times, Places, and Manner" of congressional elections. *See Wesberry*, 376 U.S. at 7–9. Limits on the legitimate use of time, place, or manner regulations are, of course, not unknown to constitutional jurisprudence. In the analogous First Amendment context, the Court has repeatedly ruled that viewpoint-based regulations of speech cannot be defended as mere time, place, or manner regulations. *E.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980).

(cont'd)
Democrats and independents alike—they didn't want their West Texas congressional district redrawn.").

As Chief Justice Rehnquist and Justice O'Connor noted in their concurrence in *Cook*, 531 U.S. at 531–32, the Election Clause mirrors the First Amendment in forbidding content-based, let alone viewpoint-based, time, place, or manner regulations. *Cf. Tashjian v. Republican Party*, 479 U.S. 208 (1986) (upholding power to set content-neutral procedures for Congressional elections). Or, to use the majority's formulation, electoral mechanisms designed to "place their targets at a political disadvantage" are outside states' Elections Clause authority. *Cook*, 531 U.S. at 525.

The Texas re-redistricting intentionally grants decisive power to citizens who have expressed favored political views. Simultaneously, it makes it as hard as possible for citizens with disfavored views to elect like-minded candidates. A state cannot possibly defend as a time, place or manner regulation an electoral system openly adopted for that viewpoint-based purpose. *See id.* at 523 ("[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.") (internal quotation marks omitted). Sham procedural regulations that purport to set election procedures, but really dictate election results, violate the Elections Clause. Here, there is not even a sham: Texas concedes that the re-redistricting was undertaken for the sole purpose of altering the outcome of future congressional elections.

Nor, if the re-redistricting is allowed to stand, would there seem to be a limiting principle to states' power to interfere with congressional elections. If the Texas legislature can redistrict for no reason other than to install the congressional delegation it prefers, what will stop a state legislature from changing a U.S. representative's district at its whim, rendering the district more or less favorable to that representative based on his or her votes in Congress, his or her responsive-

ness to local party leaders, or any other factor the legislative majority wishes? What could stop a legislature from adjusting the lines two or three or four times a decade? Nothing could be more at odds with the limited role in administering House elections that the Framers intended the state legislatures to exercise. *See U.S. Term Limits*, 514 U.S. at 808 (noting that the Elections Clause was meant to limit state legislatures' influence over the House).

Both the *Vieth* plurality and the District Court in this case suggested one possible limit to congressional redistricting abuses by states: Congress itself. The Elections Clause permits Congress to override almost all of the procedures adopted by the states for electing House members, though of course it does not *require* Congress to do anything. As the *Vieth* plurality pointed out, Congress knows what the states have been up to.

> Recent history, however, attests to Congress's awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4 to control them. Since 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting.

Vieth, 541 U.S. at 276–77 (plurality opinion) (citations omitted). The events underlying this case dramatically confirm "Congress's awareness of abusive districting practices": the re-redistricting was openly orchestrated by the Majority Leader of the (federal) House of Representatives. And his counterpart, the Minority Leader, has discussed with officials in Democrat-controlled states the possibility of copying the Republicans' innovation. *See* Chris Cillizza, *Democrats Eye Remap Payback; Leaders Target Illinois, N.M.*, Roll Call, Feb. 22, 2005. The District Court majority in its first opinion in this case expressed the hope that Congress might step in and forbid mid-decade redistricting altogether to avoid she-

nanigans like those seen in Texas. That hope seems, to put it mildly, somewhat optimistic.

There may well have been no fewer than five bills introduced in the past quarter-century (none since 1990) to regulate gerrymandering in congressional districting, as the *Vieth* plurality noted. None of those bills passed either house of Congress. Given the natural penchant of both major political parties to take maximum advantage of any legislative majority they may enjoy in the federal or state legislatures, there is no reason to expect future anti-gerrymandering bills to fare any better (all five bills cited by the *Vieth* plurality were introduced into a Democratic-majority House and failed to progress). *Vieth* and this case both happen to involve Republican gerrymanders. Of course, Democrats are not averse to similar abuses, as this Court knows from *Cox*.

Following the 2000 census, for example, Maryland's Democratic governor drafted state and federal redistricting plans that were assailed in part as gerrymanders, both on party grounds and for the way in which they punished individual legislators whom the governor considered political enemies. The state redistricting plan was struck down for violating the state constitutional requirement to give "due regard" to the boundaries of political subdivisions. *In re Legislative Districting of the State*, 805 A.2d 292 (Md. 2002). The House of Representatives plan, which was designed to (and did) cause the defeat of Republican Representative Connie Morella, helped to convert the state's delegation from 4–4 to 6–2 in favor of the Democrats but was upheld by the Fourth Circuit. *See Duckworth v. State Admin. Bd. of Election Laws*, 332 F.3d 769 (4th Cir. 2002); Sarah Koenig, *Congressional Districts Fought in Federal Suit*, Baltimore Sun, June 19, 2002, at 1B ("Even many Democrats have been hard-pressed to defend the congressional map's lines, which in places look as if they were drawn by a child experimenting with an Etch-A-Sketch.").

Around the same time, Georgia Democrats adopted the gerrymandered state legislative districts struck down in *Cox*. The party also managed to gain two seats in the state's congressional delegation in an election in which voters statewide rejected Democratic incumbents in races for Governor and U.S. Senator. Democrats eliminated Republican Congressman Bob Barr, a manager of President Clinton's impeachment trial, by putting him in the same district as another Republican incumbent, in spite of the state's having received two additional seats in the House.

Republicans had Georgia on their minds when they gerrymandered Pennsylvania and provoked the *Vieth* litigation. "Democrats rewrote the book when they did Georgia, and we would be stupid not to reciprocate," said Virginia Rep. Thomas M. Davis III, Chairman of the National Republican Congressional Committee. Thomas B. Edsall, *Democrats Hold Edge Over GOP in Redistricting; Gains Still Possible for Republicans*, Washington Post, Dec. 14, 2001, at A55.

Rep. Davis's blunt talk—"we would be stupid not to reciprocate"—is typical. Just as Republicans responded to Democrats' "rewr[iting] the book" in Georgia, Democrats have not only threatened to copy Republicans' Texas playbook in states they control, but have also begun planning to redistrict states that they hope to take control of after the 2006 midterm election. *See* Josh Kurtz, *Remap Revenge in New York?*, Roll Call, March 1, 2005.

> Regardless of the tactics Democrats may eventually choose, what is clear is that redistricting is no longer simply a once-a-decade process but rather part of the ongoing struggle by both parties to make gains in the House.

Chris Cillizza, *Democrats Eye Remap Payback*, *supra*.

In this environment, it would be naive to expect either party to use its control of Congress to stop abuses like the Texas re-redistricting. For much of our history, anti-democratic entrenchment was permitted because redistricting was an irregular and infrequent process in many states. Since this Court's one-person, one-vote decisions required regular post-census redistricting, redistricting has been a "once-a-decade process." Unless the Court acts again now, constant partisan tinkering will become the new norm, with some of the same deleterious consequences as the pre-*Baker* regime. The result would be a far greater likelihood that an ever-widening number of voters of both parties in many states would be denied the chance to affect the outcome of legislative races. Without this Court's intervention, what began as a particularly shameless power-grab in one legislature will metastasize into the national norm.

D. Equal Protection Clause

Burdening the rights of voters who express certain viewpoints, or who have certain political affiliations, violates the Equal Protection Clause as well as the Elections Clause. In *Baker* and its progeny, the Court prohibited apportionments that systematically underweighted the votes of citizens in particular districts. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("[D]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."). In *Kramer* and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Court barred allocating the franchise on differential grounds. This equal protection jurisprudence culminated in *Bush v. Gore*, 531 U.S. 98 (2000), which stopped a recount because of a lack of uniform standards for counting votes. The principle throughout has been the right of every voter to equal treatment.

In non-electoral contexts as well as electoral contexts, the Equal Protection Clause guarantees that the government will not treat people differently without a legitimate reason. *See Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Amer.*, 485 U.S. 360, 370 (1988). In a democracy, the fact that citizens have expressed differing political preferences is decidedly not a legitimate reason for treating some worse than others. That, however, was the Texas legislature's sole reason for taking up redistricting when the state already had a legal set of congressional districts. As the state itself has conceded, and as the District Court found, the process would not have been undertaken at all but for partisan advantage, which is a polite way of describing the deliberate prevention of those who have voted "incorrectly" in the past from electing candidates of their choice in the future.

Because that objective is not a legitimate basis for state action, the re-redistricting would fail even rational basis scrutiny. Ensuring the electoral success of one political party has no reasonable relationship to a legitimate governmental end. The state's interest, as distinct from the interest of the individuals who currently occupy its legislature, is in providing free and fair elections, not in guaranteeing a particular result.

Ordinary decennial redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the "one person, one vote" guarantee. A complex mixture of motives is inevitably at play in this mandatory process, which may make it hard to assign a single dominant cause to the resulting map, or even to the placement of any particular voter in a particular district. This case is different. It is indisputable that the re-redistricting would not have happened at all—there would have been *no* new map of any kind—but for the opportunity it presented for partisan advantage.

Rational-basis review is not particularly stringent, but it does serve an important purpose. "By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Yet that was precisely the state's purpose here: the burdens suffered by those who had previously voted for Democrats were not incidental but were the *raison d'être* of the entire enterprise.

As *Romer* repeated and several of the *Vieth* opinions recognized, it is a longstanding and fundamental principle that state action must be actuated by some neutral, legitimate state interest. Even if partisan considerations are inevitably part of the lawmaking process, as they undoubtedly are in redistricting, they must be accompanied by some other interest that belongs to the state, rather than to officeholders and their parties. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective."); *id.* at 333 (Stevens, J., dissenting) ("[T]he Equal Protection Clause implements a duty to govern impartially that requires, at the very least, that every decision by the sovereign serve some nonpartisan public purpose."); *id.* at 355, 360 (Breyer, J., dissenting) ("[P]ure politics often helps to secure constitutionally important democratic objectives. But sometimes it does not. Sometimes purely political 'gerrymandering' will fail to advance any plausible democratic objective while simultaneously threatening serious democratic harm. . . . The use of purely political boundary-drawing factors, even where harmful to the members of one party, will often nonetheless find justification in other desirable democratic ends, such as

maintaining relatively stable legislatures in which a minority party retains significant representation."). The fact that so few enactments fall under rational basis review reflects not so much the weakness of the test but the acceptance by politicians of the fundamental principle that laws must be affected with a public interest.

But this is not a rational basis case in any event. Laws that differentially burden the exercise of fundamental rights must pass a more stringent test: they must serve a compelling state interest. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216–17 & n.15 (1982). Texas has penalized citizens' exercise of their rights of political association and expression, as well as the right to vote. Those rights are undeniably fundamental, as we discuss at greater length in the next section of this brief concerning the First Amendment. This Court has noted that "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" is "fundamental." *See Ill. State Bd. of Elections*, 440 U.S. at 184 (internal quotation marks omitted). The re-redistricting's proponents repeatedly testified that their action served no interest *other than* preventing voters of a disfavored "political persuasion" from "cast[ing] their votes effectively."

The desire to help one faction and harm another is not even a legitimate state interest, let alone a compelling one. The fact that the legislature chose its victims on the basis of the content of their past expression, burdening the rights of voters in neighborhoods whose residents have tended to vote for a disfavored political party, only exacerbates the problem: viewpoint-based restrictions on speech are highly suspect. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828–29 (1995). Diluting the voting power of a disfavored class is, moreover, among the most fundamental breaches of democratic doctrine. *See Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred

class of voters but equality among those who meet the basic qualifications."); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."); *Bush v. Gore*, 531 U.S. at 104–05 (referring to "the equal weight accorded to each vote and the equal dignity owed to each voter" and holding that states cannot "value one person's vote over that of another").

The re-redistricting violates the Equal Protection Clause in part because of its attack on fundamental rights that are also protected by the First Amendment. But the equal protection claim is not simply a First Amendment claim dressed in different clothes. What Texas has done is contrary to the very nature of equal protection:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer, 517 U.S. at 633.

II.
The Re-redistricting Violated the First Amendment.

Like the Constitution itself, the First Amendment has an architecture that reflects an inherent, structural, and intentional commitment to representative democracy. The six clauses of the First Amendment form a set of concentric circles with the democratic citizen at the center. The text opens with Establishment Clause protection of private conscience, moves to Free Exercise protection of public displays of conscience, continues with Free Speech protection of individual expression, extends to institutional expression of ideas by guaranteeing a Free Press, goes on to Free Assembly protection of collective action, and culminates in protecting

formal interaction with the government through Petitions for Redress of Grievances. The sequence is not random. The textual rhythm of Madison's First Amendment reprises the life cycle of a democratic idea, moving from the interior recesses of the human spirit to individual expression, public discussion, collective action, and finally direct interaction with government. Madison's vision remains one of our most valuable guides to the kind of democracy the Constitution guarantees.

Electoral politics thus implicate the First Amendment's core purpose. Much of this Court's First Amendment jurisprudence has been devoted to the proposition that government must remain neutral regarding its citizens' ideological expression and association. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Mosley*, 408 U.S. at 95. The political acts of voting and running for office are quintessential exercises of free speech and free association. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780 (1983) (recognizing right to run for office as act of political association between candidate and supporters); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (noting regulation of voting burdens First Amendment rights but holding that standard of review varies with circumstances).

The neutrality principle has particular force when it comes to elections. Elections are a formal, structured marketplace. Each candidate seeks to persuade voters that his or her ideas (and the ideas of the party to which the candidate belongs) should be enacted into law. Unless government remains neutral in administering the contest, the electoral competition cannot operate fairly. It would be self-defeating to expend substantial judicial resources defending a neutral marketplace of ideas on sidewalks and in parks, only to allow the government to rig the outcome of elections that are the

culmination and object of the First Amendment's textual protections. If the Constitution forbids denying governmental employment because of an individual's political affiliation or belief, *see Elrod v. Burns*, 427 U.S. 347 (1976), and forbids conditioning government contracts on support for political incumbents, *see O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996), it cannot countenance burdening the right to vote on the same forbidden bases.

After canvassing some of these same precedents, Justice Kennedy concluded in *Vieth*:

> First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

Vieth, 541 U.S. at 314 (Kennedy, J., concurring). Texas does not deny the purpose of the re-redistricting. The question, then, is whether there are judicially manageable standards for gauging the re-redistricting's effect. *See id.* at 315 ("Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters."). It is to that question that we now turn.

III.
There Are Judicially Manageable Standards for Evaluating the Effect of the Re-redistricting.

Even if one believes (as we do not) that ordinary post-census redistricting is not amenable to manageable judicial standards, this was no ordinary redistricting. The fact that the

proponents of the legislation admitted, and the lower court found, that there was no motivation for this action other than partisan advantage sets this case apart.[5]

Unlike in *Vieth*, there is no question here of "predominant" causes. The entire process of re-redistricting was undertaken for one reason and one reason only: partisan advantage. Burdening the rights of disfavored voters, and the derivative rights of their chosen representatives, was the whole purpose, motivation, and intention for the legislature even to convene. Even if the process itself, once begun, was molded in part by considerations like the equipopulation requirement, the District Court need not have tried to discern what was the "predominant" force in the process. It needed only determine, as it already has, the sole purpose for the process's having occurred at all.

The re-redistricting was a river with a Republican sea as its only objective. The one-person, one-vote principle, incumbent protection, Voting Rights Act compliance, and the like may have formed the river's banks and shaped the precise path it took, but they affected the final destination not one whit. As the legislature and its allies in Austin and Washington vividly demonstrated, the only barriers the river would respect were those the law imposed and courts were willing to enforce. It is clear that nothing—not senate rules and traditions, not compunction over the use of national security agencies to harass state legislators, not the overwhelming opposition of citizens at public hearings—was going to stop

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[5] We do not disagree with the argument of some plaintiffs and Appellants that the legislature intentionally acted on the basis of race. We simply note that legislators testified, and the District Court found, that partisanship was the state's sole objective. To the extent that race was a factor, the legislature's reliance on a suspect classification can hardly ameliorate the constitutional injury done by its otherwise single-minded pursuit of partisan advantage.

the re-redistricting's architects of the from pursuing their objective of pure partisan advantage. *See* Office of the Inspector General, U.S. Dep't of Justice, *An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators*, at 4–6 (Aug. 12, 2003), available at http://www.usdoj.gov/oig/special/03-08a/final.pdf; Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Dep't of Tranp., *Federal Aviation Administration Efforts to Locate Aircraft N711RD* (July 15, 2003), available at http://www.oig.dot.gov/show_pdf.php?id=1127; Office of Inspector General, U.S. Dep't of Homeland Security, *Report of Investigation IN03–OIG–0662–S*, at 1, available at http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf.

These considerations do not directly have to do with assessing the re-redistricting's effects. But they are critical to understanding how those effects should be measured. In a mandatory decennial redistricting involving a complex mixture of motivations, one may find it difficult to judge how much partisan effect is "too much." Even conceding for the sake of argument that there are no judicially manageable standards for making that judgment, however, no such judgment is required in this case. Although vote dilution is inevitable under any districting scheme, and some voters will consistently be outvoted, "[i]t is one thing for a phenomenon to exist by necessity, and quite another for someone to distribute or redistribute it selectively." Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 313 (1991). Intent converts an unfortunate effect into an actionable injury. *See Washington v. Davis*, 426 U.S. 229 (1976).

It is undeniable, under any standard of measurement, that the re-redistricting accomplished the (impermissible) intention of its authors. The targeted West Texas Democrats were

purged from the House, and the Texas delegation achieved the partisan makeup that had been predicted by both supporters and opponents of the re-redistricting. A state may not burden its citizens' rights at all without a legitimate purpose. When the state acts purely for an illegitimate purpose, any effect on protected rights is "too much." The rights of hundreds of thousands, if not millions, of voters have been impaired in precisely the fashion intended; under the circumstances, it cannot credibly be contended that the Court lacks an adequate metric for determining whether there has been an impermissible effect. One need not know exactly how many people will end up in the hospital to be certain that it is wrong to put arsenic in the soup.

In an ordinary redistricting, a specific group of voters may suffer a relative inability to elect candidates of choice, but it is a complex task to draw a clear causal link between the impairment of those particular individuals' rights and legislative partisanship. They might have been "packed" or "cracked" because they were Democrats, but they may also find themselves in their current districts because the incumbent in the neighboring county needed a safe district or because the line-drawers had to ensure non-retrogression under Section 5 of the Voting Rights Act.

There is no difficulty, however, in identifying the *conditio sine qua non* for the inability of West Texas Republicans to re-elect their chosen representatives in 2004, nor for the impairment of the rights of voters elsewhere in the state. No district line would have moved an inch to protect an incumbent. No line would have moved to adhere to a city or county boundary. No line would have moved to meet the Voting Rights Act's requirements. *Nothing* would have happened to any Texas voter had the legislature and its cronies not set the process in motion for the sole purpose of discriminating against voters with disfavored viewpoints.

This case is more like *Cook v. Gralike* than it is like *Vieth*. In *Cook*, the Court struck down a law requiring the ballot to identify incumbent members of the House who were defying a state-imposed limit on the number of terms they ought to serve. The Court could have speculated about how many votes would actually be affected by the ballot notice. It could have guessed how often, if ever, an incumbent would have been defeated because of the forbidden words on the ballot. But the Court did not have to do either of those things. The state had no legitimate reason, and no authority under the Elections Clause, to put those words on the ballot in the first place. Therefore, there was no need to measure the words' effect with any precision: any effect was "too much." Just so here. Texas has acted beyond the scope of the authority granted to it by the federal Constitution, and for good measure it has also transgressed individual rights protected under the First Amendment and the Equal Protection Clause. As in *Cook*, the state's actions serve no permissible purpose. As in *Cook*, therefore, the judiciary is competent and indeed required to overturn those actions.

CONCLUSION

The District Court's judgment should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, et al.,
Appellants,

&

TRAVIS COUNTY, TEXAS, et al.,
Appellants,

&

EDDIE JACKSON, et al.,
Appellants,

&

GI FORUM OF TEXAS, et al.,
Appellants,

v.

RICK PERRY, GOVERNOR OF TEXAS, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF FOR THE CENTER FOR AMERICAN PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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BRIEF OF THE CENTER FOR AMERICAN PROGRESS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The Center for American Progress respectfully submits this brief *amicus curiae* in support of the appellants in these cases.[1]

INTEREST OF *AMICUS CURIAE*

Founded in 2003, the Center for American Progress ("the Center") is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. The Center works to find progressive and pragmatic solutions to significant problems facing our nation in order to foster a government "of the people, by the people, and for the people." In just over two years, the Center has held over 250 events featuring former presidents, Cabinet secretaries, and federal, state, and local elected officials. The Center's policy experts have authored more than 200 original reports on a wide array of public policy issues, including education, health care, tax policy, civil liberties, and international affairs, which have been cited by the media more than 1,000 times. The Center's research and policy proposals have been circulated widely on Capitol Hill and in state legislatures across the nation.

The Center has a strong commitment to good government and protecting the right of the American people to participate meaningfully in our democratic system. The Center has hosted expert policy discussions and published research on voting systems, election administration, redistricting, and expanding access to the franchise. The Center has filed *amicus curiae* briefs before this Court and other courts in cases, involving significant issues of public policy.

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[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Texas Legislature's unprecedented mid-decade partisan gerrymander burdens recognized expressive rights, and this Court should apply heightened First Amendment scrutiny to invalidate the plan. Although the Court has noted that the redistricting process is always "root-and-branch a matter of politics," *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004), this case raises unique concerns about the role of partisan politics in redistricting.

Redistricting almost always involves the classification of voters based upon the exercise of core political expression. As this Court has recognized, legislators who control the redistricting process draw district lines with an eye toward achieving specific political outcomes. To accomplish their aims, such legislators must examine and assign voters to districts using prior voting patterns and registration data. Both voting and affiliating with a political party constitute exercises of political expression that are plainly protected by the First Amendment. At its core, gerrymandering thus impinges upon recognized First Amendment rights by benefiting some individuals and penalizing others based on how those individuals have exercised their First Amendment rights.

In the past, this Court has evaluated election laws and regulations that burden voters' First Amendment rights under a flexible standard, subjecting regulations that impose significant burdens to heightened scrutiny. Although this Court has not applied this standard in the gerrymandering context, it has also never confronted a case like this one. This case involves a legislative effort to replace a *valid* court-drawn plan for no reason other than naked partisan politics; indeed, there is no dispute that the "single-minded purpose" of this plan was "to gain partisan advantage." Jurisdictional Statement of *Jackson* Pls. App. at 89a. Moreover, in replacing one valid map with another, the Texas Legislature failed to

take into account new population data of any kind, despite overwhelming evidence of important changes in the State's population and demographics. These facts call for the application of heightened scrutiny under this Court's flexible standard for assessing the permissibility of election laws and regulations that impact voters' First Amendment rights.

Under that flexible standard, election laws subjected to heightened scrutiny can only be sustained if they serve an important state interest. Traditional redistricting has always involved the important state interest of bringing district lines into compliance with the Constitution and federal law. But that interest is not at stake when, as here, a valid map is already in place. The burden therefore lies with Texas to identify an alternative interest important enough to justify its discrimination against certain of its citizens based on prior exercises of their fundamental rights. Texas cannot satisfy that burden in this case.

The Center agrees with the *Jackson* appellants that the 2003 Plan is unconnected to any legitimate state interests, and therefore fails even rational-basis review. The Center writes separately, however, to urge the Court to apply heightened scrutiny to the 2003 Plan. In any other context, government classifications based so patently on protected expressive and associational rights would be subject to strict judicial scrutiny. The fact that this case involves redistricting, rather than some other government action, should not render those very same classifications subject to rational-basis review, the default standard applicable to garden-variety economic regulations.

As this Court has recognized, partisan gerrymandering has been part of the American political landscape for several centuries. In recent years, however, both major political parties – aided by constantly improving computer technology – have engaged in increasingly aggressive and sophisticated partisan gerrymanders. The application of heightened scru-

tiny is appropriate in this case to ensure that unusually naked and pernicious *mid-decade* partisan gerrymandering does not become part and parcel of both parties' efforts to entrench their positions in Congress.

ARGUMENT

All election regulations burdening expressive rights are subject to review under this Court's standards. Consistent with basic due process protections against arbitrary state action, even incidental burdens are subject to rational-basis scrutiny. The Center agrees with the *Jackson* appellants that the Texas Plan cannot even survive this level of scrutiny because the 2003 Plan is "'inexplicable by anything but animus toward the class it affects.'" Jurisdictional Statement of *Jackson* Pls. at 14 (quoting *Romer v. Evans*, 517 U.S. 620, 632 (1996)). If the Court agrees, it need not consider whether to apply heightened scrutiny to the 2003 Plan.

Should the Court reach that question, however, the Center submits that heightened scrutiny *is* appropriate in the unusual and limited context of this type of mid-decade redistricting. The First and Fourteenth Amendments prohibit the government from inflicting injury on citizens for no reason other than political outlook, and heightened scrutiny ensures that the Court can distinguish justifiable redistricting classifications from naked or pretextual partisan gamesmanship. Indeed, this Court has already adopted a flexible standard for assessing the permissibility of election-related regulations, and that standard is easily and properly applied to this partisan gerrymander. Applying heightened scrutiny to the 2003 Plan requires its invalidation. The Court should thus invalidate the 2003 Plan and reinstate the court-drawn 2001 map.

I. THE TEXAS REDISTRICTING PLAN PLACES UNPRECEDENTED BURDENS ON EXPRESSIVE RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS, WARRANTING HEIGHTENED SCRUTINY

The freedom to express one's viewpoints at the ballot-box lies at the core of our democratic system of government. Indeed, this Court has described the "political franchise of voting" as "a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The expressive quality of voting operates in at least two distinct dimensions. First, citizens express their political choices in the voting booth by marking and casting their ballots at election time. *Cf. Burdick v. Takushi*, 504 U.S. 428, 437-39 (1992) (recognizing limited expressive function of voting); *Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (noting that ballot access restrictions impair "the voters' ability to express their political preferences"). Second, citizens express their political associations when they vote for candidates of particular parties, as well as when they engage in election-related activities such as registration or membership. *See, e.g., NAACP v. Button*, 371 U.S. 415, 430 (1963) (recognizing that affiliation with political parties represents an exercise of associational rights under the First Amendment).

Viewpoint- and content-based regulation of such core political expression is normally subject to the strongest level of scrutiny under the First Amendment. Under strict-scrutiny review, a State must advance a "compelling" government interest in such regulations, and it must then show that the regulation in question is narrowly tailored to advance that interest. *E.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972) (striking down an ordinance regulating picketing on all but labor-dispute-related subjects).

But at the same time, elections themselves are not "'Hyde Parks open to every would-be pamphleteer and politician.'" *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 n.9 (1983) (quoting *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981)). Rather, the electoral process operates as a limited public forum that is subject to regulations which "channel" expressive activity in a manner "compatible with the intended uses" of the forum. *See Burdick*, 504 U.S. at 438 (approving "politically neutral regulations that have the effect of channeling expressive activity at the polls"); *cf. Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 819 (1985) (Blackmun, J., dissenting) ("In a limited public forum . . . the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers."). The States and the Federal Government accordingly enjoy the necessary flexibility to ensure that elections are "fair and honest and [that] some sort of order, rather than chaos, [accompanies] the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). The mere fact that "[e]lection laws will invariably impose some burden upon individual voters" does not mean that all such laws are categorically or even presumptively invalid. *Burdick*, 504 U.S. at 433; *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

This Court has instead adopted a "flexible standard" to evaluate election-related laws that impact expressive rights. "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick*, 504 U.S. at 434 (quoting

Anderson, 460 U.S. at 789). "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* As in other limited-forum contexts, the burden on the State to defend its election regulations increases as the burdens on the voter are more severe. *See id.* (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)). When an election regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon First and Fourteenth Amendment rights of voters," however, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.* (quoting and citing *Anderson*, U.S. 460 at 788, 788-89 & n.9). Even then, of course, the State must identify a cognizable interest served by the regulation. But when severe burdens are placed on voters' First and Fourteenth Amendment rights, the law in question must be "narrowly drawn to advance a state interest of compelling importance." *Id.* (quotation omitted).

The Court has never applied this flexible standard to a case involving partisan gerrymandering. Instead, in its limited political gerrymandering jurisprudence, the Court has relied upon equal-protection analysis. *See generally Davis v. Bandemer*, 478 U.S. 109 (1986). Moreover, a plurality of the Court recently announced that it was prepared to abandon the search for "judicially discernible and manageable standards by which political gerrymander cases are to be decided" and to declare such cases to be nonjusticiable. *Vieth*, 541 U.S. at 278 (quoting *Davis*, 478 U.S. at 123 (plurality opinion)). Casting the pivotal fifth vote in *Vieth*, however, Justice Kennedy suggested that the continued search for manageable standards in political gerrymandering cases might find fertile ground in the First Amendment. *See id.* at 314 (Kennedy, J., concurring in the judgment). Justice Kennedy explained that "[t]he First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all,

these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Id.* Justice Kennedy suggested "that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights," *id.*, and that heightened scrutiny (specifically, strict scrutiny) would apply under such circumstances.

The flexible standard this Court has adopted in evaluating the First Amendment burdens created by election regulations in other contexts is well-suited to implement Justice Kennedy's approach and thus to evaluate the 2003 Plan in this case. The standard was designed to accommodate the reality that States must be permitted some discretion in conducting elections. Those cases have focused on a State's interest in ensuring orderly elections that are fair and honest. The redistricting context is analogous: here States must be given some room to serve valid interests, such as satisfaction of the one-person, one-vote requirement and Voting Rights Act obligations, as well as traditionally recognized districting interests. At the same time, the flexible-standard test recognizes that States do not always regulate in a valid way. In cases involving pronounced or obvious burdens on expressive rights, closer scrutiny must be brought to bear to determine whether the justifications offered by the State are sufficiently important and sufficiently advanced by the state action to justify those burdens.

The application of this standard does not call into question the permissibility of the vast majority of Congressional redistricting plans. The reason is that in the modern era, legislatures have undertaken redistricting efforts when valid district lines do not exist and where new lines therefore must be drawn to bring a map into compliance with controlling law. Although politics and partisanship are all but inherent

in such normal redistricting efforts,[2] the impingement on various voters' First Amendment rights is justified in such circumstances because drawing new lines also serves important state interests.

But this is not the usual case. As noted above, redistricting in the modern era has been limited to those situations *where no valid map exists*. Indeed, "[s]ince 1910, when the House was fixed in size at 435, the norm has been that a census is followed by reapportionment across states to fit the population, and is followed in turn by redistricting within the states. After 1910, no state undertook a second redistricting within the 10-year period between censuses except when ordered by the courts." Norman Ornstein, *One Person, One Vote Is Vital – When It's Applied Within Reason*, Roll Call, Dec. 14, 2005, at 2, *available* at 2005 WLNR 20068295. In other words, redistricting has occurred when it needs to occur – usually when new census data render extant maps invalid under the one-person, one-vote principle.

Here, by contrast, redistricting was undertaken even though the existing Congressional map was valid and would have remained so until the next census. *See* Tex. Att'y Gen. Op. GA-0063 (Apr. 23, 2003) (concluding that State law did not require a new map and that 2001 map would remain valid until 2010 census). It was also undertaken without reference to any new population data – and without any effort to obtain or create such data – that could in theory justify a mid-decade redistricting. These differences are of pro-

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[2] See *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.").

found consequence, because they squarely raise the question whether any cognizable state interest was served by the promulgation of a new map in 2003.

Indeed, the normal presumption that new maps are valid should not apply here without (at the very least) a careful examination of what interest the State has offered in place of the valid interests at stake when redistricting to replace an invalid map. The absence of those interests in the context of replacing a valid map means that there is necessarily a new balance of interests under this Court's "flexible standard" for measuring burdens on First Amendment rights under election regulations.

Without the usual presumptions in place, heightened scrutiny is triggered due to the burdens on expression inherent in redistricting and present to a self-evident degree here. Redistricting based on instincts of political self-preservation or partisan gain implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion)). This is so because voters are entitled to vote their conscience and to align with political parties that share their views without the specter of viewpoint-based government action predicated on the exercise of that expression. In this instance, the Texas Legislature chose to redraw two-year-old district lines that had been drawn to reflect voting trends in the State and that had in the prior election produced results consistent with expectations solely and specifically to suppress further the representation of their political opposition.

It is neither surprising nor significant that this Court has not previously employed this flexible standard in a partisan gerrymandering case. This Court has often extended its First

Amendment jurisprudence in the past to account for new sets of circumstances. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) ("The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."). Indeed, members of this Court have already recognized the relevance of the First Amendment in the partisan gerrymandering context. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment); *id.* at 324-25 (Stevens, J., dissenting).

For these reasons, the Texas Legislature's decision to draw patent viewpoint-based classifications during an unprecedented mid-decade redistricting in which no new population data was used requires the application of heightened judicial scrutiny.

II. THE TEXAS REDISTRICTING PLAN IS INVALID UNDER THIS COURT'S FLEXIBLE STANDARD FOR EVALUATING ELECTION REGULATIONS

Texas cannot identify a state interest that is sufficiently important to justify the First Amendment burdens imposed by the 2003 Plan. Between them, Texas and the court below identified two purported state interests. Although the State on remand principally asserted that its actions should be considered nonjusticiable, it also argued that it had a valid purpose in realigning the map to make "Texas's congressional delegation more like Texas's voting patterns." *See* State Defs' Opening Br. on Remand, *available* at 2003 WL 24051486. The three-judge panel below endorsed that principle and identified a second putative state interest: permit-

ting state *legislatures* to replace even valid court-drawn maps. *See Henderson v. Perry*, 399 F. Supp. 2d 756, 767-69 (E.D. Tex. 2005) (political purposes) (citing *Gaffney*, 412 U.S. at 754); *id.* at 775-76 & n.82 (replacing court-drawn maps) (collecting cases). Even if these ostensible interests provided "rational" bases for legislation – which the Center does not concede – they could not rise to the level of "important" state interests satisfying any form of heightened scrutiny.

1. The only interest actually advanced by the State of Texas below was that of securing a "congressional delegation more like Texas's voting patterns" at a time when a current and valid districting map was in effect. Put more directly, the State argues that it has an important state interest in securing further partisan advantage for one political party in the state's congressional delegation over others. Such a bare desire to advantage one political party and harm others based on their political views is not even considered a legitimate state interest, let alone an important one. A State has no legitimate interest in the success of any particular political party. *See Abate v. Mundt*, 403 U.S. 182, 187 (1971) (indicating that partisanship in favor of groups was not a legitimate state interest sufficient to justify population deviations among legislative districts); *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) (same). If this were not so, then all sorts of discriminatory election laws might be permissible. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.").

In addition, the fact that Texas frames its interest in electing more Republicans to Congress in terms of an interest in

better reflecting Texas voting patterns does not make the asserted interest any more capable of surviving heightened scrutiny. The notion that there is such a thing as a fairly "balanced" map that accurately reflects statewide voting patterns is illusory. A party's share of the vote varies from race to race and election cycle to election cycle, and which race or aggregation of races constitutes the appropriate proxy essentially is a matter of perspective. A state interest that is so elusive and ephemeral by nature cannot be an "important" state interest sufficient to justify burdening certain voters' First Amendment rights. To hold otherwise would be to invite States to draw new lines for every election cycle on the grounds that – based on whatever race a State wished to use at the moment – the new map better reflected statewide voting patterns. Permitting States to re-redistrict whenever they believed that the current map failed to sufficiently reflect statewide voting patterns would result in constant re-redistricting that would wreak the kind of "chaos" on the "democratic processes" that is antithetical to the very purpose of election regulations.[3] *Burdick*, 504 U.S. at 433 (quotation omitted).

2. The other interest offered by the court below fares no better. The panel explained that it is "within the prerogative

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[3] Of course, a State may attempt to achieve what it believes to be a politically balanced map in the course of normal redistricting. *See Gaffney*, 412 U.S. at 754. But merely because it is permissible for a State to pursue such an end does not mean that political balance is an important state interest. Indeed, unlike the predicates for a traditional redistricting, political balance is neither a constitutional nor a legal requirement. *See Davis*, 478 U.S. at 130 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); *id.* at 131 ("*Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.").

of the state legislatures" "to draw their own map to replace one imposed by a court." *Henderson*, 399 F. Supp. 2d at 775. But the court strained to find any precedent to support such a broadly framed proposition, settling instead for two cases that involved court-made maps that – unlike the 2001 map – contained built-in expiration dates and another case arising under circumstances entirely unlike those in this case. *See id.* at 775 n.82 (collecting cases). It failed to identify any precedent that demonstrates that a State's purported interest in permitting a legislature to replace a valid court-imposed map is sufficiently important to justify the infringement of certain voters' core expressive rights.

To be sure, this Court has recognized that, in the absence of an extant valid map, a new map drawn by a state legislature is preferable to one drawn by a federal court. *E.g.*, *Gaffney*, 412 U.S. at 749 ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan . . . . From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' . . . is primarily a political and legislative process.") (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966), and citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *see also Branch v. Smith*, 538 U.S. 254, 262 (2003); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). But that principle was not abrogated here. The intervention of a federal court in this case was made necessary only by the Texas Legislature's inability to perform its duty following the 2000 census. When the legislature is unable to complete its task in a timely fashion, a court may step in and promulgate a new set of lines. *Connor*, 431 U.S. at 415. The fact that there is a *preference* for having legislatures rather than courts draw district lines when new maps need to be drawn does not

mean the State has any interest, much less an "important" one, in replacing a court-drawn map with one drawn by the legislature.

Moreover, the insufficiency of this purported state interest is further made apparent by the fact that the 2003 Plan governed *Congressional* elections, matters which are not within a State's unfettered discretion to regulate. The Texas Legislature's authority to draw the boundaries of Congressional districts does not inhere in its sovereign power as a State. Rather, this authority derives from the Elections Clause of the United States Constitution, which permits States to regulate only the "Times, Places, and Manner" of elections for the U.S. House of Representatives. U.S. Const. art. I, § 4. Importantly, this Court has made clear that a state legislature's power to regulate federal elections – including its redistricting power – was not one of the powers "reserved by" the States under the Tenth Amendment. *Cook v. Gralike*, 531 U.S. 510, 522 (2001) ("Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.'") (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)). Just as important, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and *not as a source of power to dictate electoral outcomes*, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-34 (emphasis added). By definition, a State cannot have an important interest in permitting the legislature to craft a map that "dictate[s] electoral outcomes" when a valid court-crafted map already secures the State's other legitimate interests.[4]

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[4] This is not to say that a State can never have an interest in permitting a legislature to replace a court-drawn map. The Center does not dispute that a legislative map that replaced a court-imposed one could be

3. Finally, even assuming that one of these asserted state interests was sufficiently important to justify replacing the valid 2001 Plan with a new Congressional map, the 2003 Plan is not narrowly tailored to that purpose. As noted above, election regulations that burden voters' First and Fourteenth Amendment rights are evaluated under a flexible standard and the constitutional harm inflicted should not significantly exceed the important state interest being served. *Burdick*, 504 U.S. at 434. In drafting the 2003 Plan, however, the Texas Legislature utilized 2000 census data – data which was by then three years out of date. In so doing, the Legislature not only burdened certain voters' fundamental rights, but it also drew districts in a manner wholly indifferent to the one-person, one-vote constitutional requirement. Even if "partisan balancing" or legislative prerogative is a sufficiently important ground for redrawing a valid Congressional map, neither supposed interest can justify drawing a new map that makes no effort to ensure actual population equality exists between Congressional districts.[5]

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valid, even if done mid-decade, if it advanced an important state interest, such as updating population data, without unnecessarily classifying voters on the basis of their expressive rights.

[5] The Center does not suggest that the 2001 Plan's districts presently contain equal populations or that they contained equal populations at the time the 2003 Plan was enacted. Rather, it merely points out that, at the time the 2001 Plan was put in place, that Plan created districts with equal populations based on population data that was valid for that redistricting. In contrast, the 2003 Plan used population data which, for the reasons set forth by the *Travis County* appellants, was not valid for that redistricting. Thus, regardless of the extent to which the districts under the 2003 Plan actually deviate from population equality, the fact remains that the 2003 Plan was enacted without any regard for the one-person, one-vote constitutional requirement and without any effort to minimize actual population deviations. The Center merely posits that a mid-decade redistricting that involves the redrawing of valid district lines should not be deemed to be sufficiently tailored to an important state interest absent an effort to create actual population equality.

III. THE FLEXIBLE STANDARD IS NEITHER UNLIMITED NOR UNMANAGEABLE AS APPLIED TO THE REDISTRICTING PLAN IN THIS CASE

The foregoing framework for analyzing mid-decade partisan gerrymandering claims is both limited in application and sufficiently manageable. For the reasons stated above, this Court's flexible standard, which it has already applied in the context of other election regulations, has limited applicability to a map promulgated to satisfy a State's obligation to comply with one-person, one-vote requirements. That interest is concededly a compelling one, and in such cases the federal courts cannot "tie the hands of States," even though the new maps "will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. Indeed, it is uncertain whether this framework would even result in the invalidation of all mid-decade redistricting plans.

In addition, the standard is also a manageable one. This Court already has a wealth of experience in applying the flexible standard to other election regulations that burden voters' First Amendment rights. That precedent provides guideposts for applying the test in a consistent and predictable way. Furthermore, in contrast to the standard partisan gerrymandering case, this standard does not require this Court to judge how much partisanship is too much. Instead, this Court merely needs to examine whether a State can provide an important state interest that would justify redistricting when a valid map was already in place.

CONCLUSION

For the foregoing reasons, and for the reasons stated by appellants, this Court should reverse the ruling of the District Court and remand the case with instructions to reinstate the valid map promulgated by the Eastern District of Texas.

Respectfully submitted,

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EDDIE JACKSON; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; TRAVIS COUNTY; GI FORUM OF TEXAS,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

BRIEF OF *AMICI CURIAE* ALAN HESLOP, PHD.; ROD ADAIR; GARY BERNER; JOHN A. MORGAN; JOHN B. MORGAN; AND ROBERT WARD IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

Amici Curiae are academics and/or practitioners with practical experience in the districting phase of the apportionment process. They are all either responsible for, or work with those responsible for, the drafting of district-based representational plans around the nation. Their combined experience covers just about all of the steps of the complex process whereby political power in America is distributed amongst the people. All have been involved, at some level, with districting for both congressional delegations and state legislatures. *Amici* share a concern for fair redistricting and an enlightened role for the courts in this inherently political process.[1]

Amicus **Alan Heslop, PhD.,** is Director Emeritus and Founder of the Rose Institute at Claremont McKenna College, Claremont, California. He was the Rose Professor of State and Local Government at Claremont McKenna from 1967 until 2004 and is now Senior Research Fellow in the School of Politics and Economics at Claremont Graduate University. He has also taught political science at the University of Texas and Texas A&M. One of his major areas of interest at the Rose Institute has been all phases of preparation for, and review of, representational plans. He has been involved with the districting aspects of apportionment for numerous clients over the past four decades in many states from start to finish. He has been an expert witness on redistricting and electoral matters and has served on federal and state commissions.

Amicus **Rod Adair** is President of New Mexico Demographic Research, Roswell, New Mexico and a State Senator. He drafted and reviewed plans for the 2001 legislative and congressional redistricting in New Mexico. He also redistricted county commission and school board districts throughout the state. In 2001 and 2002 he served as an expert witness in New Mexico court cases involving both the congressional and state House of Representatives redistricting.

1. No counsel for a party authored this brief in whole or in part. No monetary contribution toward the preparation or submission of this brief has been made by any person other than *Amici Curiae* and their counsel. By letters filed with the Clerk, counsels for all parties have consented to the filing of this brief.

Amicus **Gary Berner** is Senior Staff member of the House Republican Caucus of the Connecticut General Assembly, Hartford, Connecticut. In addition to his current role as Sr. Policy Advisor to the Minority Leader, he has served as the Caucus's Chief of Staff (1994-2000) and as the Caucus's Redistricting Director (2000-2002). As Redistricting Director, Mr. Berner had responsibility for the preparation, monitoring and oversight of, the districting plans that are considered by the state legislature. This includes plans for both congress and both houses of the General Assembly. Prior to his staff assignments Mr. Berner was twice elected to the Connecticut House of Representatives (1987-1991), and was selected as an Asst. Minority Leader in his second term.

Amici **John A. Morgan** is President, and **John B. Morgan** is Vice-President of Applied Research Coordinates, Ltd., Reston, Virginia. Together they have over forty years of experience with the drafting and review of districting plans for representational entities in over a dozen states. As redistricting practitioners they have worked on and reviewed hundreds of maps and districting plans across the county. This includes plans for congress and state legislatures. They advise legislative caucuses both as to the preparation for districting as well as the post-districting application of campaigns and election support.

Amicus **Bob Ward** is the Minority Leader of the Connecticut House, Hartford, Connecticut. Representative Ward is currently serving in his eleventh elected term and his sixth term as Minority Leader, making him the longest serving legislative leader in modern Connecticut history. He spearheaded the operation of the House Republicans' effort to prepare for, draft, and review the districting plans for congress and the legislature that were considered by the General Assembly following the 2000 census. He served on the Reapportionment Committee, and then was appointed by the Governor to the Reapportionment Commission which adopted the congressional plan.

SUMMARY OF ARGUMENT

The 2004 Texas congressional redistricting plan is not an excessive or egregious partisan gerrymander. As is clear from this Court's partisan gerrymandering jurisprudence, and the briefs of the parties in this appeal, there are many proposed methods for attempting to measure the "partisan fairness" of a districting plan. The undersigned *Amici* seek to assist the Court in its analysis of the 2004 Texas plan by providing the Court with analyses – based upon election results and simple mathematical measures – of Texas congressional plans used in the 2000, 2002 and 2004 elections. These analyses are based upon comparisons of these plans with generally accepted relationships between votes received and seats won. *Amici* explain this seats-votes ratio, which is often depicted in a graph known as the "seats-votes curve," and illustrate how a party winning more than a majority of the votes usually wins a supermajority of the seats due to a "seat bonus." In support of their analyses, *Amici* provide the Court with data from a variety of different elections so that there can be no issue as to whether *Amici* have "cherry picked" election results in order to reach a desired conclusion. Regardless of the analytical method employed, the various election results analyses presented by *Amici* compel a single conclusion: the 2004 Texas congressional plan is more "partisanly fair" than the 2002 plan. As the analysis in the brief shows and the District Court concluded below, the 2004 plan more accurately represents the partisan balance of the state of Texas. The generally accepted seats-votes curve analysis shows that election results under the 2004 plan are closer than those under the 2002 plan to what is expected in a majoritarian congressional districts election system such as ours.

This Court cannot determine that the Texas legislature acted in an invidious manner or in a way unrelated to any legitimate legislative objective unless it is willing to overrule a line of precedents begun with *Gaffney v. Cummings*, 412 U.S. 735 (1973). The state of Texas 2004 congressional districting plan more accurately provides for a distribution of congressional seats based upon relative partisan strength – election results – than the 2002 plan. This Court recognized

in *Gaffney* that such "partisan fairness" is a legitimate legislative purpose in the consideration and adoption of a representative districting plan. *See Gaffney*, 412 U.S. at 753.

Different political scientists, analysts, or, advocates may dispute how or which election results best represent partisan strength in Texas, but no amount of statistical furor can hide the simple fact that in 2002 the Republican Party was the majority party in Texas under any rational analysis. In 2002, its candidates received a majority of the Texas votes but a minority of Texas congressional seats. In *Reynolds v. Sims*, this Court observed that "[l]ogically, in a society ostensibly grounded on representative government, it would seem reasonable that the majority of the people of a state could elect a majority of that state's legislators." *Reynolds v.* Sims, 377 U.S. 533, 565 (1964). Logically in Texas, therefore, it would seem reasonable that the majority of the people of the state should be able to elect a majority of the state's congressional delegation. The Texas legislature, acting in its sovereign capacity, adopted a new plan for the 2004 elections permitting this to happen for the first time in more than a decade of congressional elections.

Amici also explain additional considerations that are present when reviewing state legislative rather than congressional plans. Most importantly, self-perpetuation of power is a significant issue for legislative redistricting, but not congressional. There is also relief available to parties affected by congressional gerrymandering, either in the form of congressional statutory action specifically limiting gerrymandering or the passing of criteria that would have such effect. This relief does not apply to state legislative plans. Also, there are states in which congressional districts have been created that are little more than amalgamations of census blocks without any underlying recognizable geographic components. The existing statutory requirement for "congressional districts," set forth at 2 U.S.C. §2c, provides an alternative statutory basis for this Court to invalidate such plans without this, or other, Courts having to decide the unquestionably contentious question of how much political unfairness is too much in an equal protection analytical framework.

ARGUMENT

I. THE APPROPRIATE TRANSLATION OF VOTES INTO SEATS HISTORICALLY HAS BEEN ASSESSED BY POLITICAL SCIENTISTS USING THE "SEATS-VOTES CURVE"

A. THE RELATIONSHIP OF VOTES RECEIVED TO SEATS WON

From the early days of the American Republic, most elections to the U.S. House of Representatives have been held under districting plans.[2] One of the purposes of holding elections by district is to provide for a more equitable distribution of the votes cast for candidates in comparison to an at-large system.

> *The very essence of districting is to produce a different - a more "politically fair" - result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats.*

Gaffney v. Cummings, 412 U.S. 735, 753 (1973). While the dynamics of a districting system, especially a single member system like that used for Congress, may produce a more "politically fair" result, they also present some analytical problems. The main dynamic of concern here relates to the conversion of votes into seats.

The seminal article on the topic of seats and votes in American elections was published in 1973 by Edward Tufte[3] who summarized part of the perceptual problem as follows:

> *Arrangements for translating votes into legislative seats almost always work to benefit the party winning the largest share of the votes. That the politically rich get richer has infuriated the partisans of minority parties, encouraged those favoring parliamentary rule, and, finally, bemused a variety of statisticians and political scientists who have tried to develop*

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2. Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* 59 (1968); Rosemarie Zagarri, *The Politics of Size: Representation in the United States, 1776-1850*, at 107-18 (1987).

3. Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Pol. Sci. Rev. 540 (1973) (hereinafter "Tufte"). *See also* the earlier work of M.G. Kendall & A. Stuart, *The Law of Cubic Proportion in Electoral Results*, 1 Brit. J. Soc. 183 (1950).

parsimonious descriptions and explanations of the inflation of the legislative power of the victorious party.[4]

Tufte reviewed election results in terms of votes and seats for 132 elections in six two-party systems, including congressional and state legislative elections, and assessed the political consequences "over the years for a variety of electoral systems." Tufte at 540. He concluded that some of the results "appear useful for evaluating the consequences of redistricting plans, and might well be used for that purpose by the courts." *Id.* His study identified the following four characteristics of most two-party districting systems: 1) "As the party's share of the vote increases, its share of the seats also increases in a fairly regular fashion"; 2) "The party that receives a majority of the votes usually receives a majority of parliamentary seats"; 3) "A party that wins a majority of votes generally wins an even larger majority of seats"; and 4) "In most elections (100 percent in this series), the winning party receives less than 65 percent of the votes." *Id.*

This relationship of the *votes received* to *seats won* has been depicted graphically by a "seats-votes curve" (sometimes called an "S-curve" given its shape). In a single member district electoral system, the translation of votes into seats is not proportional or linear. The nonlinear relationship as described by Tufte is a well documented regularity in single member district systems like the one used for the U.S. House of Representatives.[5]

The relationship of votes to seats is a key concept in understanding the dynamics of a districting system, and the translation of votes into seats is a key concern of both line-drawers and plan reviewers. As such, the seats-votes curve can be of assistance in the evaluation of the political impacts of redistricting plans.

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4. Tufte. By giving the "same reward to parties with 1 percent margins as to those with 50 percent margins ... the votes a party obtains beyond the minimum requirement are, in a sense, wasted." Douglas Rae, *The Political Consequences of Electoral Laws* 27 (1967).

5. *See* Rein Taagepera & Matthew S. Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (1989); Peter J. Taylor *et al.*, *The Geography of Representation: A Review of Recent Findings in Electoral Laws and Their Political Consequences* 184 (Bernard Grofman & Arend Lijphart eds., 1986); David M. Farrell, *Electoral Systems: A Comparative Introduction* (2001).

From the layperson's perspective, it can be hard to dispel the concept of strict proportionality,[6] which actually has little application in districting. In our majoritarian two-party system, most districted elections include candidates from the two major parties. Based upon the seats-votes curve, if Party A receives 20% of the vote (and the other party then receives 80%), Party A can "expect" to receive a very small proportion of the seats (about 7 seats in a body the size of the U.S. House (435 seats)). But if Party A increases its vote share by 1 percentage point (to 21 percent of the vote), the gain in seats will not be proportional and the party may be "expected" to gain only one seat. When the two parties are more competitive with one another (*i.e.*, they both can command about 50% of the vote), then small increases in their vote totals nationwide have a disproportionate effect on the seats won.

The area of most concern for this type of analysis in American politics is the region of the seats-votes relationship where each party is potentially competitive in a broad sense, from about 35 or 40% to about 60 or 65% of the aggregate vote. This is the general range of election results in our competitive two-party system. This is also the area of the curve that is mostly linear, facilitating analysis. Applying statistical analysis to this linear framework, Tufte's study showed that the *slope*[7] of the line in this region usually had a value between 2 and 3.[8]

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6. That is, a party that receives X% of the vote should also win X% of the seats in the legislative chamber, representing a 1 to 1 relationship between votes and seats.

7. Lines are a collection of data pairs, one data item for the X, or horizontal, axis and one data item for the Y, or vertical, axis. The slope of a line is merely the degree to which a change in the data item for one axis is followed by a change in the value for the other axis. In this case it would mean the degree to which a change in the percentage of the Votes (horizontal axis) is followed by a change in the percentage of the Seats (vertical axis).

8. Tufte found different slopes for different periods of time for U.S. House elections. A slope of 3 is the foundation for the generalized "cube law" which is the product of early research on the topic. "Indeed, it is generally believed that single-member plurality elections produce disproportions of cubic proportions," Douglas Rae, *The Political Consequences of Electoral Laws* 27 (1967) (citing M.G. Kendall & A. Stuart, *The Law of Cubic Proportion in Electoral Results*, 1 Brit. J. Soc. 183 (1950)).

(Cont'd)

A "value" of 3 means that if a party manages to pick up an extra 1% of the vote nationwide, they would be expected to win approximately an additional 3% of the seats in the chamber.[9] This is *"the inflation of the legislative power"* to which Tufte refers, sometimes referred to as the "seat bonus."[10]

Under the single-member districting scheme used in 43 of the 50 states for congressional elections, the political party receiving more than 50% of all the votes cast statewide usually wins more than 50% of the seats (*see* Charts TX-22, 23, and 24 in the Appendix). Thus, using the seats-votes curve with a value of 3, if a political party were to receive 55% of the votes, it would be expected to receive about 65% of the seats. Similarly, if a political party were to receive 60% of the votes, it would be expected to win about 77% of the seats.[11] With 65% of the votes, the expected percentage of seats won would be about 86%.[12]

The accompanying graphic (*see* Chart TX-1 in the Appendix) illustrates the seats-votes curve using a value of 3 for the slope. It is readily apparent that the relationship differs

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(Cont'd)

See also Chart TX-11a in the Appendix which illustrates that a curve value of 3 seems to fit congressional elections in Texas from 1982 to 2004. Using a lower number, for example a curve value of 2 or 2.5, would reduce the expected seats slightly but it would also indicate that the actual results were more "off-the-curve."

9. This would only be the "expected" increase in the area of the curve which is mostly linear, from approximately 35% to 65%.

10. For more on seats and votes, see Andrew Gelman & Gary King, *Estimating the Electoral Consequences of Legislative Redistricting*, 85 J. Am. Stat. Ass'n, No. 410, June 1990, at 247, and Graham Gudgin & Peter J. Taylor, *Seats, Votes, and the Spatial Organization of Elections* (1979).

11. In reality, the slope of the curve only approximates 3 close to the 50/50 point the slope decreases somewhat as the distance from 50/50 increases. Note also that in most cases, the "votes" component refers to the percentage of the "major party" vote, which is the combination of the votes for the Democrats and Republicans only.

12. The seats-votes curve is used here to represent the possible results of seats based upon the votes received. Obviously, there is no hard and fast rule that X% of the votes must translate into Y% of the seats. "Expected" is used to indicate that such a result would be a reasonable, foreseeable outcome according to the relationship of votes to seats in a single member districting system.

greatly from a straight proportional relationship, which would be represented by a diagonal line from the lower-left corner (0,0) to the upper-right corner (100,100) of the chart.[13]

A few examples of possible combinations of votes to seats are indicated on the chart by a shaded "X" or by a diamond-shaped symbol. Example "A" represents a case in which the party received 55% of the votes statewide and won 65% of the seats. Example "B" is the mirror-image of the previous example: a party received only 45% of the votes statewide and won only 35% of the seats. Both of these examples would be "on the curve," that is, the results would be expected considering the seat bonus aspect of the seats-votes curve.

The examples labeled as "C" and "D" would be "off the curve," that is, these are not "normal" results. Nevertheless, all four of these examples would still be logical in the sense that they represented "true" cases.[14] In examples "A" and "C," the party did receive a majority of the votes and it did win a majority of the seats ("true positives" majority of votes and seats). In examples "B" and "D," the party did not receive a majority of the votes and it did not win a majority of the seats ("true negatives" - minority of votes and seats).

Examples "E" and "F" represent two anomalies. Example "E" shows a party that received a majority of the votes; the expectation here is that the party would win a majority of the seats (a positive) yet it did not (a "false positive"). Example

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13. A straight line would be present in proportional representational or list systems such as those found in South Africa, Finland or Germany.

14. The terms "true" and "false" and "positive" and "negative" are used here solely as a logical construct to assist in the understanding of the relationship and the majoritarian principle that a majority of the voters should control a majority of the seats. A "positive" case would be one in which a majority of the votes was received. A "negative" case would be one in which a majority of the votes was NOT received. A "true" case would be one in which the majority of votes translates into a majority of the seats. A "false" case would be one in which the majority of the votes does NOT translate into a majority of the seats. The chart is subdivided into four portions, or quadrants, that include each of the four possibilities for this True/False, Positive/Negative framework. Of course, special cases to consider are the ones that actually fall on the 50% votes or 50% seats reference lines. This usually occurs with an even number of seats or in states with a very competitive election environment.

"F" depicts a party that did not receive a majority of the votes; the expectation here is that the party would not win a majority of the seats (a negative) yet it did (a "false negative"). Examples "E" and "F" are not only "off the curve" but also "false" cases.

Thus, using the seats-votes analysis, the inquiry revolves around two factors: 1) the basic inquiry as to the chart quadrant of each political party; and 2) the degree to which the data pairs (votes received and seats won) are near the seats-votes curve.

Most seats-votes charts are drawn with the Democrats as the party of interest.[15] Therefore, if the data point on the chart, *i.e.*, the intersection of the votes received and seats won, is to the left of the seats-votes curve, there is a possible advantage to the Democrats. The reason for this is that such a point to the left of, or above the curve, represents a case in which the Democrats received *more seats* than their percentage of the votes would warrant, based upon the seats-votes curve.

Another factor to recognize when reviewing such charts is the significance of "false" cases like the ones discussed above (any data point that appears in the upper left-hand quadrant of the chart or the lower right-hand quadrant). These cases represent anti-majoritarian results in that the party that received a majority of the votes did not receive a majority of the seats.

The concept of the seats-votes curve thus forms the basis of one of the key analytical frameworks used in assessing districting plans.[16] Nevertheless, while the outcome component (the vertical axis, or, percentage of seats) of the relationship is generally determined easily, there are several possible measures for determining the "votes" portion (the horizontal axis) of the relationship for congressional elections. Several measures of determining the "votes" may offer insight

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15. The reason for this is unknown but no significance as to the party of interest is implied. It may be simply that the Democrats were the majority congressional party during the formulation of much of the early research.

16. *See* Richard G. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 UCLA L. Rev. 185, 191 (1985) ("[S]ooner or later it [the Supreme Court] will have to take a position on the significance of the relationship between votes and seats won by each political party.").

into the majoritarian question raised by Justice Breyer in *Vieth v. Jubelirer*, whether "a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power." *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting). Alternatives for assessing this majority support include at least the following: a) votes for the congressional races; b) votes for a particular statewide election, *e.g.*, President, Governor or some other partisan office; c) a combination of the votes for several statewide offices; or d) estimates based upon some hypothetical model.[17]

B. METHODOLOGICAL APPROACHES

1. Using Votes from Texas Congressional Elections

Using the aggregate votes cast in congressional elections as a basis for the analysis of congressional elections has been a standard methodological approach for decades; this was the approach used in Tufte's analysis in 1973.[18] Yet there are several ways to examine the relationship of seats to votes for congressional elections. The first decision is which votes to use. An aggregate of all congressional votes for all districts in Texas for each election year is a simple and relevant choice.[19] For the time period from 1982 through 2004, this provides 12 data items (elections): five for the redistricting cycle of the 1980s (1982-84-86-88-90); five for the redistricting cycle of the 1990s (1992-94-96-98-2000); plus one each for the 2002 and the 2004 elections.

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17. An additional consideration is whether to calculate the votes as a percentage of all votes cast or as percentage of the "major party" votes. Substantial differences will generally occur only when the collective votes received by independent candidates is above a minor level. For most discussions, the numbers used in this brief are the percentage of the major party vote.

18. *See* Tufte. Statewide aggregations of the raw congressional votes are readily available. *See* Richard M. Scammon *et al.*, *America Votes* 25 (2003); Jerrold G. Rusk, *A Statistical History of the American Electorate* (2001); Bureau of the Census, *Statistical Abstract of the United States, 1948*, at 316 (1949); Erik Austin, *Political Facts of the United States Since 1789*, at 241 *et seq.* (1986)

19. "[M]easured by the votes actually cast for all candidates who identify themselves as members of that party in the relevant set of elections; i.e., in congressional elections if a congressional map is being challenged." *Vieth*, 541 U.S. at 366 (Breyer, J., dissenting).

Table 1. Percentage of Votes and Seats for the Democrats in Congressional Elections for Texas, 1982-2004, (Aggregate Totals of Major Party Votes Received and Actual Congressional Seats Won).[20]

Election Year	Dem % of Major Party Vote Received	Dem % of Actual Congressional Seats Won	Note
1982	66	81	True Positive
1984	58	63	True Positive
1986	58	63	True Positive
1988	60	70	True Positive
1990	55	70	True Positive
1992	51	70	True Positive
1994	43	63	**False Negative**
1996	46	57	**False Negative**
1998	46	57	**False Negative**
2000	49	57	**False Negative**
2002	45	53	**False Negative**
2004	40	34	True Negative

Table 1 demonstrates two basic political facts with respect to Texas congressional elections. First, whereas the Democrats commanded a majority of the votes in the 1980s, they could no longer do so into the 1990s. Second, even though they had lost the support of the electorate, the redistricting plans in effect through 2002 allowed the Democrats to retain a majority of Texas congressional seats while receiving a decreasing minority of the votes ("false negatives").

20. The percentage of votes for the Democrats listed in this table is based upon the percentage of major party votes cast. Using other methods of calculating the percentage of votes for the Democrats would not change that status for most years. The only possible exceptions would be for 1998, and possibly 2000, wherein it could be argued that the status for the Democrats might be True Positive.

For five successive elections, from the "big Republican year" of 1994 through 2002, the Democrats did not get a majority of the vote, and thus, based upon the seats-votes curve, would not be expected to win a majority of the seats. However, in all five elections Democrats won a majority of the congressional seats ("false negatives").

The 2002 court-drawn plan[21] failed to alleviate this problem: the Democrats still received a minority of the votes yet retained a majority of the congressional seats. Only with the implementation of the 2004 plan have election results conformed with the majoritarian aspect of congressional elections. The simple fact is that candidates of the Democratic party have lost the support of most Texas voters over the past decade (*see* Chart TX-11b in the Appendix), but the Democratic Party has lost a majority of the Texas congressional delegation only because the 2004 redistricting plan finally forged a districting plan that enables an appropriate relationship between the votes cast and the seats won. The 1990s and 2002 plans entrenched a minority in power. The 2004 plan permitted a majority to "work its political will." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

Applying these actual Texas congressional results to the seats-votes curve illustrates this as well (*see* Chart TX-11a in the Appendix, with shaded "X"s indicating the 2000, 2002 and 2004 elections). Even with the 1994 national Republican sweep, the election most "off the curve" was the 1994 election under the original 1992 plan. The 1996 election, held under a revised plan following litigation[22] was still "off the curve" in the favor of the Democrats. The 1998 and 2000 elections followed in the same vein and the 2002 election did little to ameliorate this inconsistency. It is only the congressional 2004 election, although still somewhat off the curve in favor of the Democrats, that is now at least in the logical portion, or quadrant, of the seats-votes graph. A majority of the voters

21. In this brief, *Amici* refer to the redistricting plans at issue by the election year for which they were effective. By way of cross-reference, the 2000 plan is also known as the 1990s' plan or plan 1000C; the 2002 plan is also known as the 2001 plan or plan 1151C; the 2004 plan is also known as the 2003 plan or plan 1374C.

22. *See Bush v. Vera*, 517 U.S. 952 (1996).

get a majority of the seats, the most basic promise of this Court in *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

The following table (*see* Table 2a below) lists the actual congressional votes and the expected seats based upon the seats-votes curve and demonstrates the shortage of Republican seats caused by each of the three plans. In all three elections, the Republicans received a majority of the congressional vote, but in each election, including 2004, fell short of the expected number of seats under the seats-votes curve. With an additional 4.7% points of the vote in 2004, even with a gain of 6 seats, the translation of the Republicans' 59.6% of the votes into seats would generally have been expected to result in 3 more seats.

Table 2a. Shortage of Congressional Seats for Republicans for each Texas Congressional Plan (based upon the actual congressional vote and the seats-votes curve)

Plan	[A] Republican Percentage of the Major Party Vote	[B] Expected GOP Seats (by Seats-Votes curve)	[C] Actual GOP Congressional Seats Won	[D] Shortage: Actual Compared Expected
2000	51.2	16 of 30	13	-3
2002	54.9	20 of 32	15	-5
2004	59.6	24 of 32	21	-3

2. Using Votes from Texas Statewide Elections

A similar method of reviewing Texas congressional elections was used in the district court's decision (*see* Joint Appendix, lower court opinion, at page 46). This approach uses the "Statewide Strength" as the "votes" component in the seats-votes relationship (*see* Chart TX-12 in the Appendix). This is described as the average for each year of all statewide partisan elections, excluding President, but including judicial elections. Judge Higginbotham, for the lower court, stated that "[f]or our purposes, this provides a rough approximation of a party's general appeal statewide" (*see* Joint Appendix at 47).

Using the statewide strength as a basis tends to minimize any district-specific, or plan-specific, factors that could affect the analysis. Yet, the results of applying the lower court's numbers to the seats-votes curve are remarkably similar to the previous approach using just the congressional numbers alone.

The District Court's approach shows several elections in which, based upon the average statewide strength, the Democrats did not have a majority of the electorate, yet they still managed to win a majority of the seats in the congressional delegation under the redistricting plans in effect for each year ("false negatives"). These cases are the five elections held from 1994 to 2002. This is the "entrenched minority in power" about which Justice Breyer expressed concern in *Vieth*. *Vieth*, 541 U.S. at 361-362 (Breyer, J., dissenting). Once again, only with the election held under the 2004 plan is the minority political position of the Democrat Party appropriately reflected in the congressional results. The 2004 congressional election *improved* the seats-votes relationship because it both moved the intersection of the votes received to the seats won closer to the curve and eliminated a non-majoritarian result. Again, each plan demonstrates a shortage of Republican seats over what could reasonably be expected. Also, regardless of whether a value of 3 is used for the seats-votes curve or a lower value, the relative difference between the 2004 plan and the previous ones is obvious.

Table 2b. Shortage of Congressional Seats for Republicans for each Texas Congressional Plan (based upon the lower court's "Statewide Strength" and the seats-votes curve).[23]

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23. The lower court calculated the statewide strength based upon all available statewide partisan races (excluding president) as a percentage of the total vote. The numbers in the table reflect an adjustment to percentages based upon the major party vote. Portions of seats are rounded up to the nearest whole number, 0.5 is rounded up to the next highest seat. For most years there is only a very slight adjustment.

Plan	[A] Republican Percentage of "Statewide Strength"	[B] Expected GOP Seats (by Seats-Votes curve)	[C] Actual GOP Congressional Seats Won	[D] Shortage: Actual Compared Expected
2000	59.6	23 of 30	13	-10
2002	58.2	23 of 32	15	-8
2004	58.6	24 of 32	21	-3

3. Using One Statewide Texas Election as a Benchmark for Plan Comparison to Districts Carried in a Statewide Race

A further application of the District Court's approach can be made using a static indicator, *i.e.*, one election, here the 1998 election for Commissioner of Agriculture, as a benchmark for comparison. By using one election contest, rather than an average of elections from different years, this method isolates differences in the outcome from factors in each specific plan. This allows both a comparative and relative review of the three separate congressional plans used in the 2000, 2002 and 2004 elections in Texas.

For this one statewide race, the Republicans received 57.2% of the major party vote and the Democrats received 42.8%. Using the seats-votes curve we can estimate the percentage of the seats that this percentage of these votes would be expected to produce. As discussed above, with a seats-votes curve of 3, for every 1% increase in votes, there should be approximately a 3% increase in the seats won. For the Republicans, 57.2% of the vote translates into an "expected" 70.5% of seats. For the Democrats, 42.8% of the vote translates into an "expected" 29.5% of seats.

Applying these expected percentages of the seats for each election, held under different plans, produces the following summary:

Table 2c. Shortage of Congressional Seats for Republicans for each Texas Congressional Plan (based upon the 1998 race for Commissioner of Agriculture and the seats-votes curve)

Plan	[A] Republican Percentage for 1998 C. Agriculture	[B] Expected Republican Districts (by Seats-Votes curve)	[C] Districts Carried By GOP Statewide Candidate	[D] Shortage: Districts Carried to Expected
2000	57.2	21 of 30	18	-3
2002	57.2	22 of 32	19	-3
2004	57.2	22 of 32	21	-1

In each of these three elections, Republicans fell short of their "expected" share of seats. The 2002 plan did little to assuage the problem of the entrenched minority. It was only the 2004 plan that came close to permitting the majority to "work its political will." *Vieth*, 541 U.S. at 362 (Breyer, J., dissenting).

While reasonable minds may differ as to the appropriateness of this one race, the 1998 Commissioner of Agriculture, for such an analysis, the fact remains that the relative disparity, *i.e.*, the difference between the expected and the actual seats, was not improved by the 2002 plan but was improved by the 2004 plan.

This comparison, using a static statistical base, also illustrates that it is the 2004 plan that best conforms with the expectations of the seats-votes relationship.[24] The 2004 plan also best conforms with the fairness principle Democrat appellants[25] proposed in *Vieth*.

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24. Note also that by using the 2000 Presidential race rather than the 1998 Agriculture race, a similar result would be found. With 60.9% of the statewide vote, Republicans would be expected to win 25 out of 32 seats. Yet even with a popular former Governor at the top of the ticket, under all three plans there would still be a shortage of districts carried.

25. Brief of Appellant Opp. Mot. Aff. at 4, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580). ("The frustration of majority rule is the linchpin

(Cont'd)

In summary, this section has reviewed the election results from the state of Texas. Regardless of the measure used, the fact that Republicans were able to translate their 60% of the Congressional vote into 66% of the Congressional seats is not an unrealistic outcome, given that we know the majority party does receive more than a proportional share of the seats statewide and is consistent with what is to be expected under the seats to votes relationship.

C. THE TEXAS CONGRESSIONAL PLANS AS PART OF THE NATIONAL CONGRESSIONAL MAP

1. Comparison Using National Congressional Votes Over Time

The results of several congressional elections can be reviewed year-by-year using the national totals of votes cast and seats won. The office of the Clerk of the U.S. House publishes biennial reports with the state and national totals for all congressional races.[26]

A review of the national congressional vote totals for the years 2000, 2002 and 2004 demonstrates that the 2004 national map was closer to the seats-votes curve than the 2002 map. (*See* Chart TX-21 in the Appendix). For the 2002 election, the Democrats received 47.6% of the national major party

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(Cont'd)

of appellants' claim. As their complaint clearly alleges, today one party consistently wins a majority of the vote in congressional elections in Pennsylvania, yet the other party is now virtually assured a majority of the State's congressional seats. But the guiding majoritarian ethic underlying our system of government demands that the party receiving the most votes typically will win the most seats.")

26. Reports back to 1920 are available via the internet at Off. of the Clerk, House of Representatives, http://clerk.house.gov/members/electionInfo/elections.html. They are entitled *Statistics of the [Presidential and] Congressional Election*. In actuality, for some years there may be some small differences in aggregate numbers used by analysts due to either a) discrepancies with state reports; b) special elections and/or elections not held on the November general election day; or c) party designations of candidates in some states. A concern to be noted relates to the fact that many congressional races are either completely uncontested or largely uncompetitive. However, in every year since 1982, except 1994, the number of these seats won by Democrats has exceeded those won by Republicans, in some years by substantial numbers. Therefore, to the extent that votes are underestimated, it would be the votes of the Republicans that suffer more.

congressional vote yet won 47.1% of the seats. The fact that this is a nearly straight proportional result is enticing yet misleading. By using a seats-votes curve with a slope value of 3, at 47.6% of the vote, the Democrats would only be expected to win 43% of the seats. By winning 47% of the seats, this is an overage of 4%, or approximately 12 seats.

For the 2004 election, the Democrats received slightly more of the national congressional vote, or 48.6%, with which they would be expected to win 46% of the seats, which is what they did win. Democrats won 46.4% of the seats, virtually "dead-on" the corresponding point of the seats/votes curve.[27]

2. Comparison of Texas as One of 50 Separate Delegations

The U.S. House is a composite chamber, comprised of members from 50 state delegations. After the 2000 apportionment there were seven at-large states so there are currently 43 distinct congressional districting plans for the U.S. House. A review of the national map by state delegation can be approached in a manner similar to that used above for the Texas delegation alone. Again, there are several alternatives: a) using the actual congressional votes, aggregated by state[28]; b) using the congressional results but based upon an average of all districts; and c) using a cross-state static political base. For this review, we will focus on the 2004 results, for each delegation by each method. No matter which method is used, the Texas delegation is not an outlier delegation.[29]

The first method, using the actual major party congressional results (*see* Chart TX-22 in the Appendix) demonstrates that with Texas 2004 map Democrats candidates did not get a majority of the vote (receiving 40.3% of the major party vote) and did not win a majority of the seats ("true negative").

27. Again, the seats-votes curve is used here for the purpose of illustration of what might be expected by the relationship of seats to votes in single member districting.

28. Aside from the 7 single member at-large states, the states of Arkansas, Florida and Louisiana, which have contests for which candidates are not on the ballot, may be excluded in some years.

29. Texas was an outlier for both the 2000 and 2002 elections where Texas was one of the few delegations, certainly the largest, in which a majority of the votes did not translate into a majority of the seats (*see* Chart TX-51, 52 Appendix.)

The second method, using the average of the major party vote percentages, has the same result - minority of the votes equals a minority of the seats ("true negative") (*see* Chart TX-23 in the Appendix).

The same result is reached using a third method - Presidential results - by congressional district (*see* Chart TX-24 in the Appendix). The Presidential results permit a generic cross-state analysis. These results are used by political observers and academics around the nation,[30] are calculated after each Presidential election and are published in standard national political reference sources.[31] Presidential results are also frequently used by political stakeholders during the line-drawing process.[32] This is the only statewide result that is available for every state and district.[33]

The 2004 graphical charts of these three methods illustrate that there are some cases in which the party that received a majority of the votes did not win a majority of the seats ("false cases"). Most of these states are designated as "false cases" because either they have an even number of seats or the "control" of the delegation is determined by only one seat or because the majority of the votes was a very slim one. (*see* Chart TX-41 in the Appendix).

Nevertheless, using any of these methods, Texas is near the middle of all state delegations. There are several states substantially "off-the-curve" to the left, meaning an advantage for the Democrats, and there are also several states "off-the-curve" to the right, meaning an advantage for the Republicans. Irrespective of whether any of these outliers reach an

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30. *See* David Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6(3) Polity, Spring 1974, at 295; Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats, in Redistricting in the New Millennium* 183 (Peter F. Galderisi ed., 2005).

31. *See, e.g.*, Michael Barone et al., *The Almanac of American Politics 2006* (2005) (published biennially since 1974); Thomas R. Dye et al., *Politics in America* (6th ed. 2004) (published biennially since 1982); Charlie Cook, *The Cook Political Report* (published periodically throughout the year).

32. Clark Bensen, *Substantial Political Consequences: A Practitioner's Perspective on Redistricting*, Extensions, Fall 2004, at 5, 7.

33. These numbers are also reconfigured for subsequent redistricting plans. Thus, they are available for all states for each Congress.

"extremity of unfairness," *Vieth*, 541 U.S. at 344 (Souter, J., dissenting), the Texas 2004 plan is clearly not an outlier. As Justice Kennedy observed "[e]xcessiveness is not easily determined." *Id.* at 316 (Kennedy, J., concurring). But a lack of excessiveness is easily determined here. Furthermore, alteration of any individual state congressional redistricting plan, no matter how extreme, without reference to all of the other states congressional plans, will necessarily destroy the balancing effect that currently causes the national map to be basically fair (*see* Charts TX-21 and 24 in the Appendix).

Election results provide no basis for the characterization of the 2004 plan as an extreme or excessive partisan gerrymander. As Justice Breyer noted in *Vieth*, "[t]he bottom line is that courts should be able to identify the presence of one important gerrymandering evil, the unjust entrenching in power of a political party that the voters have rejected." 541 U.S. at 361-62 (Breyer, J., dissenting). Democratic Party candidates have been rejected by an ever growing majority of Texas voters, yet their counsel demands that this Court re-entrench them in power through a return to the 2002 congressional plan. Surely, if one can advocate that a court can identify this anti-majority evil and remedy it, why should not a state legislature provide the remedy. The 2004 plan removed Justice Breyer's strongest "indicia of abuse" - an entrenched minority holding on to power. *Id.* at 368.

In *Davis v. Bandemer*, 478 U. S. 109, 126 n.9 (1986), Justice White, writing for the plurality, noted that "a level of parity between votes and representation . . . is hardly an illegitimate extrapolation from our general majoritarian ethic and the objective of fair and adequate representation recognized in *Reynolds v. Sims*, 377 U.S. 533 (1964)." In *Gaffney*, this Court approved a statewide districting plan, which measured statewide political strength, not against registration data, but against actual votes cast. 412 U.S. at 738. *See also Karcher v. Daggett*, 462 U.S. 725, 754-55 & n.13 (1983) (Stevens, J., concurring).

If the difference between votes received and seats won is measured by how far "off-the-curve" a state's delegation is, at least a dozen states evidence a difference greater than that

found in the 2004 Texas plan. If the difference is measured as the relative difference between the votes received and the seats won, there are at least two dozen states with a greater difference. There are 43 states that have congressional districting plans. If this Court invalidates the 2004 Texas Plan as an excessive or extreme partisan gerrymander, then federal courts will be entering "a vast wonderland of judicial review of political activity," of the type this Court warned against in *Rogers v. Lodge*, 458 U.S. 613, 649-50 (1982) (Stevens, J., dissenting). The 2004 Texas plan cannot be fairly described as an extreme partisan gerrymander.

D. PARTISAN SYMMETRY

Amicus Professors King, Grofman, *et al.* promote the concept of "partisan symmetry" as a standard for plan assessment. Yet their brief includes no such analysis of any districting plans using this concept nor have any appellants advanced such analysis. The application of partisan symmetry to plan analysis, which requires subjective assessment from the analyst as to inclusion and the analytical weight of input variables, is fraught with potential pitfalls. The use of partisan symmetry is not a panacea for a court. At this stage of the Texas redistricting saga, it is more akin to Pandora's box.[34]

II. ISSUES THAT ARE UNIQUE TO CONGRESSIONAL DISTRICTING PLANS

A. ENTRENCHMENT BY INCUMBENTS

A gross partisan gerrymander of a state legislative plan can violate democratic values by conceding to the legislature the power of self selection. In extreme circumstances, this results in representatives arguably choosing their constituents,

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34. The subjectivity of applying partisan symmetry can be better understood by reviewing the software developed by Professor King known as "JudgeIt" (see JudgeIt, A Program for Evaluating Electoral Systems and Redistricting Plans, *at* http://gking.harvard.edu/judgeit/judgeit.html (accessed Jan. 12, 2006) for more information on the software itself). Examples of factors to be considered for inclusion are "a set of explanatory variables (such as vote in the last election, incumbency status, partisan control, campaign spending, etc.)" "Experts can disagree about which set of input data is relevant for a given case . . ." and the weight ascribed thereto. King Amicus at 10. While *Amici* King *et al.* downplay the importance of these differences, these choices can and do make real differences in the estimates that the statistical model will generate.

rather than the other way around, as the Framers intended. It can also lead to what Justice Breyer, dissenting in *Vieth*, termed "[t]he democratic harm of unjustified entrenchment" by a minority political party in power. 541 U.S. at 360. However, entrenchment is not a significant issue in this case, and does not warrant the intervention of the Court, for three reasons.

First, Members of Congress do not draw their own districts, as state legislators generally do, making personal political entrenchment more difficult to achieve. The U.S. House of Representatives does not enact congressional districting plans. And while Members of Congress may sometimes influence the drafting process, they have no "vote" or formal control over the process in any state. Thus, unlike state legislators, Members of Congress cannot insulate themselves from the popular will by drafting or redrafting their districts.

Second, this Court should not intervene in the "political thicket" of partisan gerrymandering of congressional districts because there is other, non-judicial relief available to the people through the political process. Justice Clark, concurring in *Baker v. Carr*, opined that he would "not consider intervention by this court in so delicate a field if there were any other timely and effective relief available to the people of Tennessee" by which they could effect the reapportionment of their legislature. 369 U.S. 186, 258 (1962) (Clark, J., concurring). As Justice Breyer notes in *Vieth*, improper gerrymandering can normally be cured by the majority through resort to the democratic process, and without resort to the courts. 541 U.S. at 362 ("Courts need not intervene often to prevent the kind of abuse I have described, because those harmed constitute a political majority, and a majority normally can work its political will."). Justice Breyer then explains that

> [w]here a State has improperly gerrymandered legislative or congressional districts to the majority's disadvantage, the majority should be able to elect officials in statewide races – particularly the Governor – who may help to undo the harm that districting has caused the majority's party, in the next round of districting if not sooner.

Id. Third, even if these remedies did not exist, the concept of entrenchment has no application here because the 2004 Texas

congressional plan does not result in the entrenchment of a minority. *See* discussion in Section I.C.1, *supra.*

B. NATIONAL LEVELING

The decentralization of the American Congressional redistricting process serves as a check on the aggregate amount of partisan bias that a predominantly state legislatively-directed redistricting system can produce nationally, as intended by the founders. *See The Federalist No.* 10 (James Madison) (Hallowell ed., 1842). "It is true that the same method is to a large degree resorted to by the several states, but the division of political power is so general and diverse that notwithstanding the inherent vice of the system of gerrymandering, some kind of equality of distribution results."[35] The national 2004 congressional election returns reinforce this statement.[36]

III. SOLUTION TO PARTISAN GERRYMANDERING

A. CONGRESSIONAL STATUTORY SOLUTION DISTRICTING CRITERIA

The solution to the problem of partisan congressional gerrymandering is not, as Appellants suggest, to involve the Courts more and more deeply in the process of line drawing. Rather, the solution is a legislative one, involving Congress. Article I, § 4 of the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but the Congress may at any time by Law make or alter such Regulations,* except as to the Places of chusing [sic] Senators." (emphasis added). Congress – not the Courts – is the governmental organ vested with the express Constitutional authority to regulate redistricting. And though

35. House Committee Report, 1901, *quoted in* David Butler & Bruce Cain, *Congressional Redistricting: Comparative and Theoretical Perspectives* 24, 32 (1992) (finding that, as an empirical matter, redistricting lines generally exhibit minimal partisan bias); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 542 (1994) (same). During the 1992 election cycle, after an equally suspect round of partisan gerrymandering, the House "experienced its largest turnover in recent memory." Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence in Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 654 (2002).

36. *See* Section I.C.1, *supra.*

Congress has not chosen to exercise this function recently, "[t]he power bestowed on Congress to regulate elections, and in particular to restrain the practice of political gerrymandering, has not lain dormant." *Vieth*, 541 U.S. at 276 (plurality opinion).

During the past two hundred years, Congress has passed numerous laws regulating the redistricting part of the apportionment process, by ratifying criteria for the drawing of district lines. *Id.*; citing Apportionment Act of 1842, ch. 47, 5 Stat. 491 (requiring Congressional elections to be from single-member districts "composed of contiguous territory"); Apportionment Act of 1862, ch.170, 12 Stat. 572 (imposing the same requirements); Apportionment Act of 1872, ch. 11, 17 Stat. 28 (requiring both contiguousness and "as nearly as practicable an equal number of inhabitants"); Apportionment Act of 1901, ch. 93, 31 Stat. 733 (adding a compactness requirements). When the most recent Act was passed in 1911, ch. 5, 37 Stat. 13, "[t]he requirements of contiguity, compactness, and equality of population were repeated . . . but were not thereafter continued." *Vieth*, 541 U.S. at 276-277. Though currently Congress requires only single-member districts, *see* 2 U.S.C. § 2c, "[r]ecent history, however, attests to Congress' awareness of the sort of districting practices appellants protest, and of its power under Article I, § 4 to control them." *Vieth*, 541 U.S. at 277. The Court further observed that "[s]ince 1980, no fewer than five bills have been introduced to regulate gerrymandering in congressional districting." *Id.* (citations omitted). In fact, since *Vieth* was decided in 2004, the pace of legislative efforts in Congress has quickened considerably. In contrast to the five bills in the twenty-four years before *Vieth*, in the one year since *Vieth*, at least *two* new congressional redistricting bills have been introduced in Congress.

Both bills attempt to apply uniform, nationwide statutory standards for congressional redistricting. *See* H.R. 2642, 109th Cong. (2005) (titled "Fairness and Independence in Redistricting Act of 2005"); H.R. 4094, 109th Cong. (2005) (titled "Redistricting Reform Act of 2005"). Both bills would require, among other things, that redistricting be handled by bipartisan

commissions in each state, who would be required to consider compactness, contiguity, and population equality, and prohibited from considering factors such as political affiliation or race of constituents. *Id.*

It is therefore clear that not only is Congress a more appropriate entity than the Courts to address the issue of partisan gerrymandering, but Congress is aware of its power, has exercised it before, and has the opportunity to do so again, if it determines that there is a need for such legislation. However, the Court should not confuse Congress' slow, deliberative approach to regulating gerrymandering with an abdication of that power. Given the legislative history described above, if Congress determines that legislation is necessary, it can exercise its discretion and act accordingly.

B. STATUTORY REQUIREMENT FOR GEOGRAPHICALLY-BASED DISTRICTS

Another way of addressing the issue of extreme gerrymandering is to analyze whether a disputed district is incompatible with the statutory districting system enacted by Congress. A statutory analysis provides the Court with a more manageable approach to address some egregious gerrymandered districts than the different measurements of partisan fairness. The torturously-shaped land masses that North Carolina,[37] Louisiana,[38] and Georgia,[39] called "Congressional Districts" were not truly "districts," as that term was used by Congress in the Act. These so-called districts are "amalgamations of census geography or blocs bearing no identifiable relationship to any geographic entity." Although this Court rejected these congressional plans as racial gerrymanders, alternatively, this Court could have invalidated them on statutory grounds. True districts are recognizable and understandable to both the electorate, who benefit from being able to identify their legislator and citizens with whom they share an interest, and to the elected, who benefit from recognizing the electorate and interests they represent.

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37. *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Easley v. Cromartie*, 532 U.S. 234 (2001).

38. *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993), *rev'd sub. nom., United States v. Hays*, 515 U.S. 737 (1995).

39. *Miller v. Johnson*, 515 U.S. 900 (1995).

American political history makes clear that Congress used the term "district" to delineate a specific geographically-based representational unit, a concept rooted in British law. Early colonists modeled the first legislative assembly held in America after the House of Commons, with members coming from and representing various plantations, towns, and areas. Kenneth C. Martis, *The Historical Atlas of the United States Congressional Districts, 1789-1983*, §1 (1982) (congressional districts). The area-specific notion of localized districts is also evident in James Madison's writings urging ratification of the Constitution. In Federalist Paper No. 56, Madison argued that geographically-limited representative districts would ensure that representatives mirrored the ideology and concerns of their constituents. "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either which will not be within the knowledge of the representative of the district." *The Federalist* No. 56, at 250 (James Madison) (Hallowell ed., 1842). Madison clearly viewed districts as encompassing local, recognizable geographical units from which elected representatives would "bring with them . . . a local knowledge of their respective districts." *Id.* at 261.

In addition to the historical context illuminating the manner in which the term "district" was generally used in 1842, debate on the 1842 Act further indicates that Congress used the term to refer to a recognizable local representational unit of geography that respects political subdivisions. Senator Graham commented "[w]e find in every great nation with any extension of country . . . that the representative assemblies of the people have been chosen by counties, parishes, departments, and districts, by whatever named called. It ensures that personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation." *Cong. Globe*, 36th Cong., 2d Sess. app. 749 (1842). The House debate also focused on the advantages of localized, geographically recognizable districts; Congressman Summers stated, "[t]he essential feature of representative democracy is that the Representative shall reflect the will and know the wants of his constituents. He

should live among them, be familiar with their condition, and hold with them a common political interest. These ends can only be secured by providing for representative elections in districts suited to the situation and convenience of the people." *Id.* at 354. To be sure, there is nothing in the legislative history of the first Apportionment Act that would indicate that the drafters ever considered that districts would be divided in any way other than straightforward geographic partitions representing local interest.

While the 1842 Apportionment Act has gone through a number of renditions over the past 150 years, the requirement that Congressional elections be held in "districts" has remained generally constant since 1842.[40] Thus, the use of the term in 2 U.S.C. §2c should be given its historical significance. The term "district" encompasses the explicit views of the Founding Fathers and early legislators that effective representation can only be had by dividing a state into unassuming geographic units encompassing a relatively recognizable region. Such "districts" give effect to political subdivisions, allow representatives to gain the "intimate familiarity" with local interests necessary to represent communities of interest, and are "convenient" for constituents. The tortured and sprawling amalgamations in some congressional plans,[41] in contrast, largely fail to follow any city or geographical reasoning, preventing representatives from becoming intimately familiar with issues important to their constituents and, to the extent that a representative is familiar with issues, often require the representative to represent communities of diverse interests and are inconvenient for voters. Geographical compactness serves independent values; it facilitates political organization, electoral campaigning and constituent representation. *See Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (Stevens, J., concurring); *see also Prosser v. Election Bd.*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court *per curiam*).

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40. An Apportionment Act passed in 1850, ch. 11, 9 Stat. 433, dropped the provision requiring election by districts, but this provision was restored by act in 1862, ch. 170, 12 Stat. 572.

41. For example, Louisiana's Fourth Congressional District 1992 plan, or North Carolina's Tenth Congressional District 1992 plan.

To understand the concept of district as found in 2 U.S.C. § 2c, one must examine districts as they existed at the time of the Act's enactment in 1967, and at the time of the first predecessor Act requiring districts in 1842. The simplest comparison is visual. A court with maps from these time periods will see the stark differences between districts as they existed in 1842 and 1967, and the geographic pieces which some states present today as their 21st century congressional districts. Of course, visual inspection by a court can be supplemented with quantitative and qualitative measurements. There are a number of specific measurements of compactness or geographic unity which can assist the courting comparing districts as they existed at the time of the enactment of the federal statutory district requirement and now.[42] These various methods recognized in political science and geographic professional literature permit the Court not to be consigned solely to an aesthetic consideration.

This Court's handling of pornography is not an unreasonable analogy, as gerrymandering has been called political pornography. In fact, Justice Stewart's famous test for pornography, "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964), was cited in the context of gerrymandering by Justice Stevens in *Karcher*, 402 U.S. at 755, at n.15 (Stevens, J. concurring). Justice Stevens observed, "[d]ramatic departures from compactness are a sign that something must be amiss." *Id.*

This Court has also had a role in defining the term "district." That this Court has not expressly addressed the issue of what constitutes a district under 2 U.S.C. § 2c does not mean that this Court has not delineated an understanding of what constitutes a district. In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), this Court clearly expressed an understanding of the requirement of a degree of geographic compactness for the creation of representational districts, holding that a threshold matter in Voting Rights Act Section 2 litigation,

42. Bruce Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation"*, 14 Harv. J. on Legis. 825 (1977). *See also Connor v. Finch*, 431 U.S. 407 (1977); Earnest C. Reock, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 Midwest J. of Pol Sci. 70 (1961).

single-member districts may be required from a multi-member district scheme when a minority group is "sufficiently large and *geographically compact* to constitute a majority in a single-member district." (Emphasis added.) In *Gingles* and its numerous progeny, this Court recognized the requirement of geographic compactness in the creation of representational districts. *See, e.g., Growe v. Emison*, 507 U.S. 25, 40 (1993).

Some congressional maps simply could not have been created in 1842 or 1967 because of the absence of the technological ability to craft such a map. Some "districts" are created from an amalgamation of census blocks, not political subdivisions, neighborhoods or any recognizable geographic, social, governmental or political unit. The 2004 Texas congressional plan in this case does not present to this Court the torturous and bizarre districts appropriate for this analysis, but it is a reasonable and manageable approach in other cases. There is a point at which districts go from "ugly" to "nonexistent." As this Court observed in *Shaw v. Reno*, 509 U.S. 630 (1993), and *Shaw v. Hunt*, 517 U.S. 899 (1996), "appearances do matter" in redistricting. Not every list of census blocks can be a congressional district without consideration of actual geography.

CONCLUSION

The adoption by the elected representatives of the citizens of Texas, through its legislature, of a new congressional districting plan for 2004 and subsequent elections was an action expressly provided for in our Constitution. State legislatures, not federal courts, have the responsibility to enact congressional districting plans. As the District Court held, and the Amici respectfully suggest, the election results, methods and analyses provided herein show the 2004 plan is significantly better at translating the votes of Texans into congressional representatives of their choice than the prior court-drawn plan. A majority of Texas voters elected a majority of its congressional delegation in 2004 for the first time in more than a decade.

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APPENDIX

Chart TX-1. Hypothetical Seats-Votes Curve;

Chart TX-11a. Seats Won compared to Votes Received, Texas Congress, 1982-2004 (Seats-Votes Curve);

Chart TX-11b. Seats Won compared to Votes Received, Texas Congress, 1982-2004 (Time Line Graph);

Chart TX-12. Seats Won compared to Votes Received, Statewide Strength, 1962-2004 (Seats-Votes Curve);

Chart TX-21. Seats Won compared to Votes Received, National Votes, 1982-2004 (Seats-Votes Curve);

Chart TX-22. Seats Won compared to Votes Received, State Delegations, Major Party Vote, 2004 (Seats-Votes Curve);

Chart TX-23. Seats Won compared to Votes Received, State Delegations, Average Percentage of the Major Party Vote, 2004 (Seats-Votes Curve);

Chart TX-24. Seats Won compared to Votes Received, State Delegations, Presidential Results by Congressional District, 2004 (Seats-Votes Curve);

Chart TX-41. False Cases in Congressional Elections, All States, 2004 (Table to accompany Charts TX-22, 23, and 24);

Chart TX-51. Seats Won compared to Votes Received, State Delegations, Major Party Vote, 2000 (Seats-Votes Curve);

Chart TX-52. Seats Won compared to Votes Received, State Delegations, Major Party Vote, 2002 (Seats-Votes Curve);

Chart TX-71. Seats Won compared to Votes Received, Reports of the Clerk of the U.S. House of Representatives, All States, 1982-2004 (Table of Figures with Time Line Graph).

Appendix

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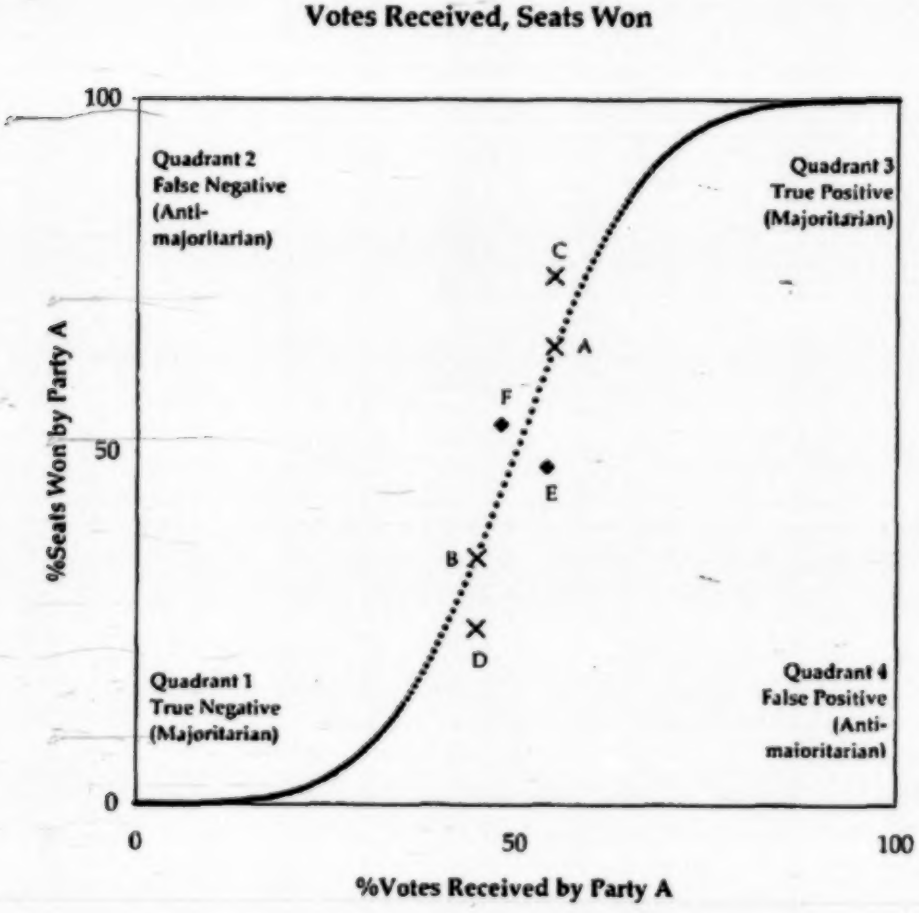
Appendix

Hypothetical Seats-Votes Curve

Example of the relationship between Votes Received and Seats Won

Chart TX-1.
Curve value is 3

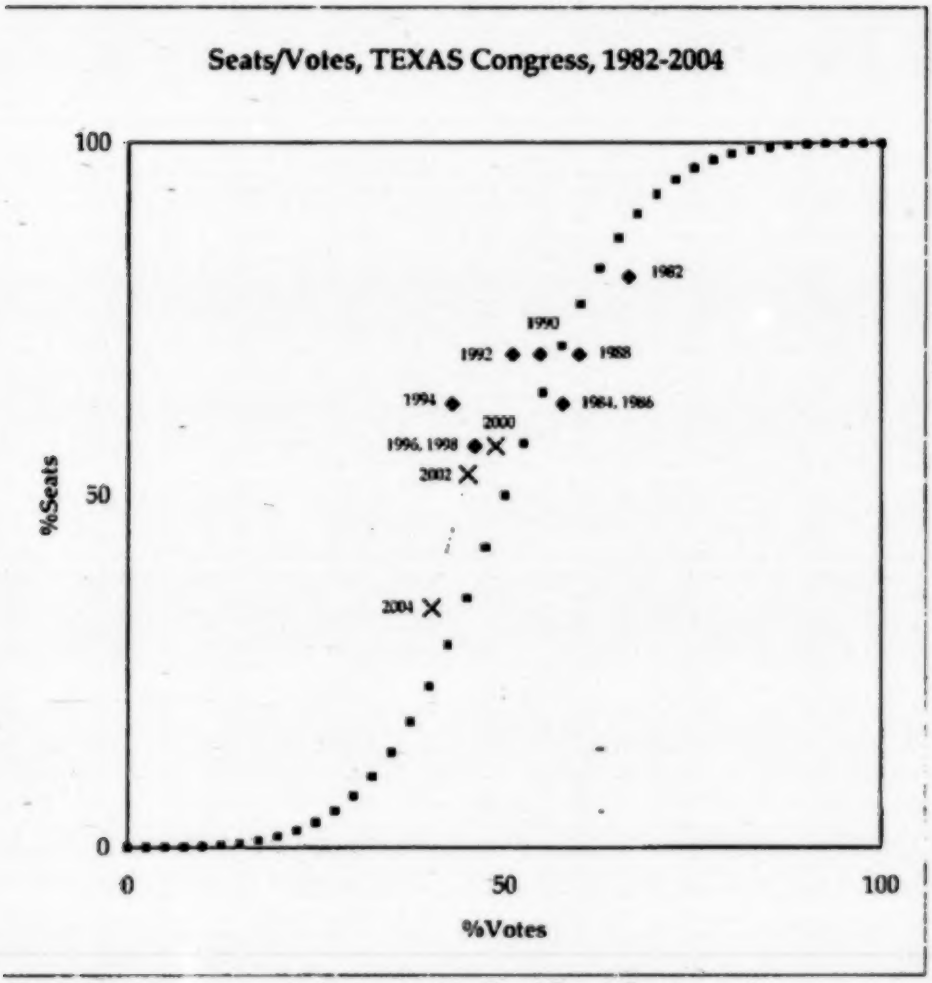


Data Point	%Votes	%Seats	Quadrant	True/False Status
A	55	65	3	True Positive
B	45	35	1	True Negative
C	55	75	3	True Positive
D	45	25	1	True Negative
E	54	48	4	False Positive
F	48	54	2	False Negative

Appendix

Seats Won compared to Votes Received, Texas Congress **Chart TX-11a.**

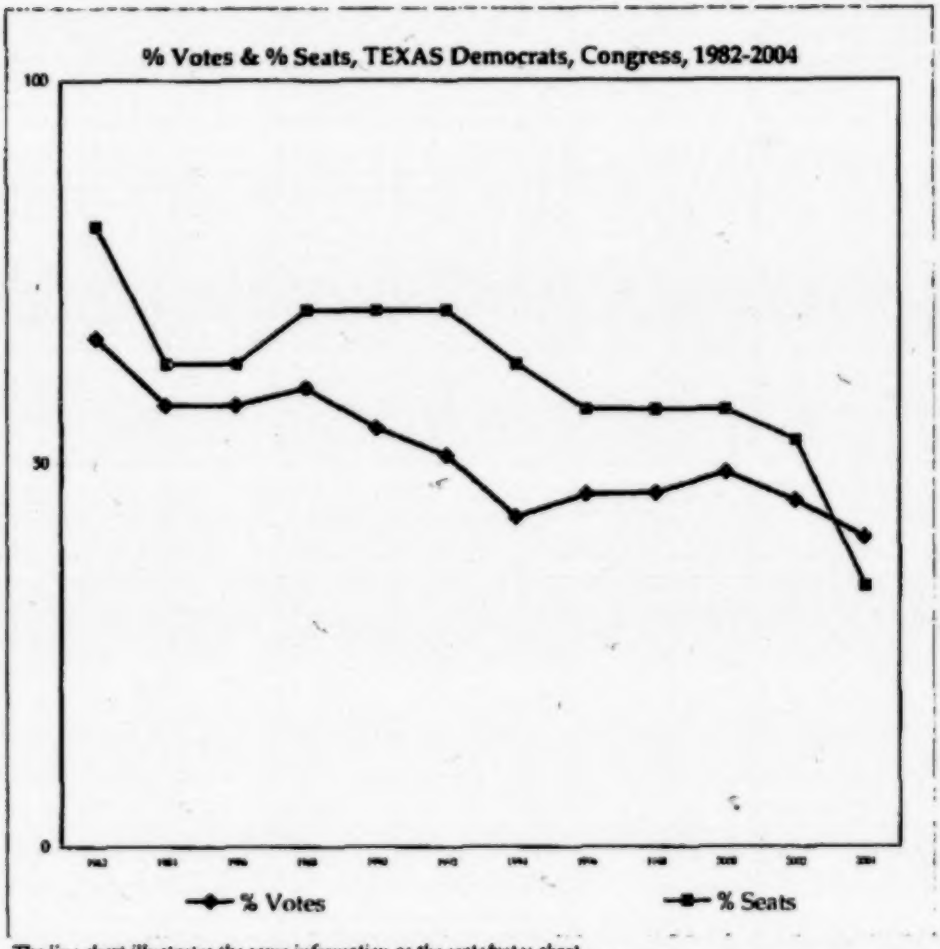
Votes based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3



Note: Each symbol represents one election; years marked with an "X" are indicated on page 2.

Appendix

Seats Won compared to Votes Received, Texas Congress **Chart TX-11b.**



The line chart illustrates the same information as the seats/votes chart.

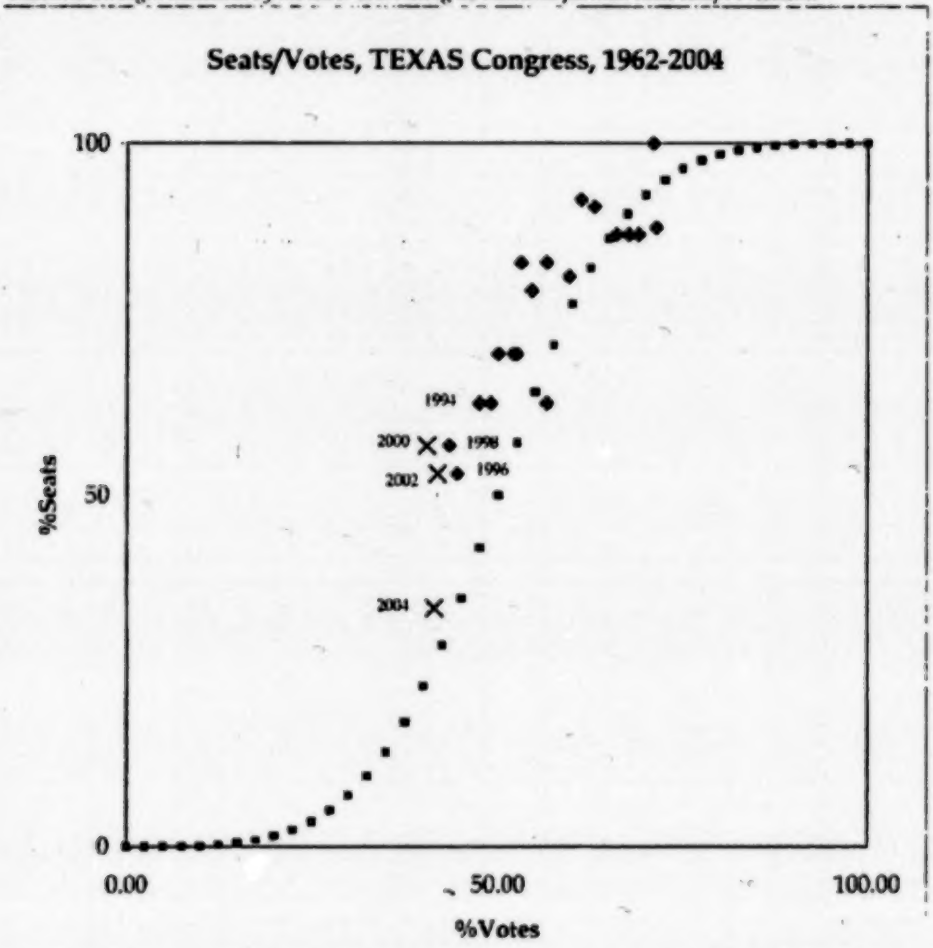
Year	D% MajVote	D% TotSeats	D Seats	All Seats
1982	66	81	22	27
1984	58	63	17	27
1986	58	63	17	27
1988	60	70	19	27
1990	55	70	19	27
1992	51	70	21	30
1994	43	63	19	30
1996	46	57	17	30
1998	46	57	17	30
2000	49	57	17	30
2002	45	53	17	32
2004	40	34	11	32

Appendix

Seats Won compared to Votes Received, Statewide Strength **Chart TX-12.**

Votes based upon the Major Party Statewide Strength for the DEMOCRATS Curve value is 3

Statewide Strength calculated by the lower court using all statewide partisan races except President.



Note: Each symbol represents one election; years marked with an "X" are underlined below.

Year	D% TotVote	D% TotSeats	Year	D% TotVote	D% TotSeats
1962	63.0	91.0	1984	49.0	63.0
1964	71.0	100.0	1986	56.6	63.0
1966	67.7	87.0	1988	52.5	70.0
1968	69.0	87.0	1990	52.0	70.0
1970	66.0	87.0	1992	50.0	70.0
1972	53.1	83.0	1994	47.5	63.0
1974	71.4	88.0	1996	44.4	53.0
1976	61.2	92.0	1998	43.4	57.0
1978	56.6	83.0	2000	40.4	57.0
1980	54.5	79.0	2002	41.8	53.0
1982	59.6	81.0	2004	41.4	34.0

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Appendix

Year	D% TotVote	D% TotSeats	D Seats	All Seats	D S/V %Dif
1962	63.0	91	20	22	44.4
1964	71.0	100	22	22	40.8
1966	67.7	87	20	23	28.6
1968	69.0	87	20	23	26.1
1970	66.0	87	20	23	31.8
1972	53.1	83	20	24	56.2
1974	71.4	88	21	24	23.2
1976	61.2	92	22	24	50.3
1978	56.6	83	20	24	46.7
1980	54.5	79	19	24	44.8
1982	59.6	81	22	27	35.9
1984	49.0	63	17	27	28.6
1986	56.6	63	17	27	11.4
1988	52.5	70	19	27	33.3
1990	52.0	70	19	27	34.5
1992	50.0	70	21	30	40.0
1994	47.5	63	19	30	32.7
1996	44.4	53	16	30	19.3
1998	43.4	57	17	30	31.2
2000	40.4	57	17	30	41.1
2002	41.8	53	17	32	26.7
2004	41.4	34	11	32	-17.9

Symbols indicated on the chart by an "X" are underlined in this table.

Appendix

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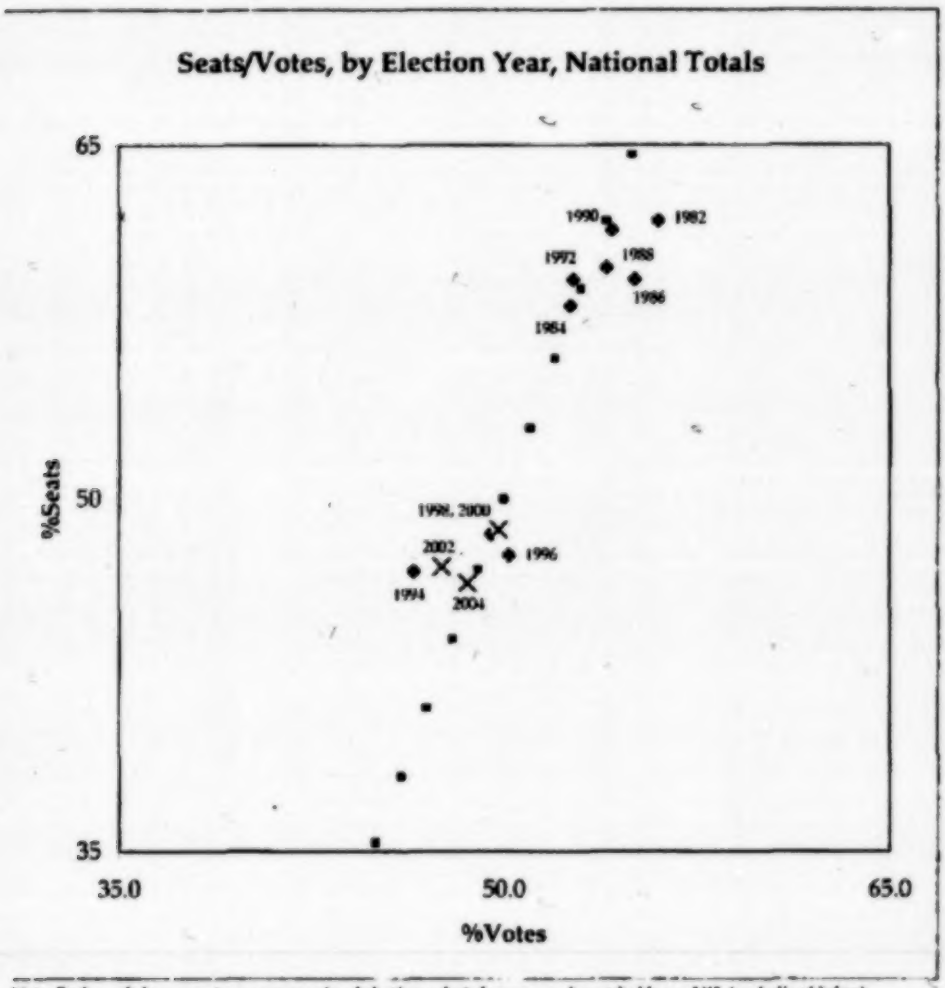
Appendix

Seats Won compared to Votes Received, National Vote **Chart TX-21.**

Based upon the Major Party Votes for Congress for the DEMOCRATS Curve value is 3



Note: Each symbol represents one congressional election; selected years may be marked by an "X" (underlined below).

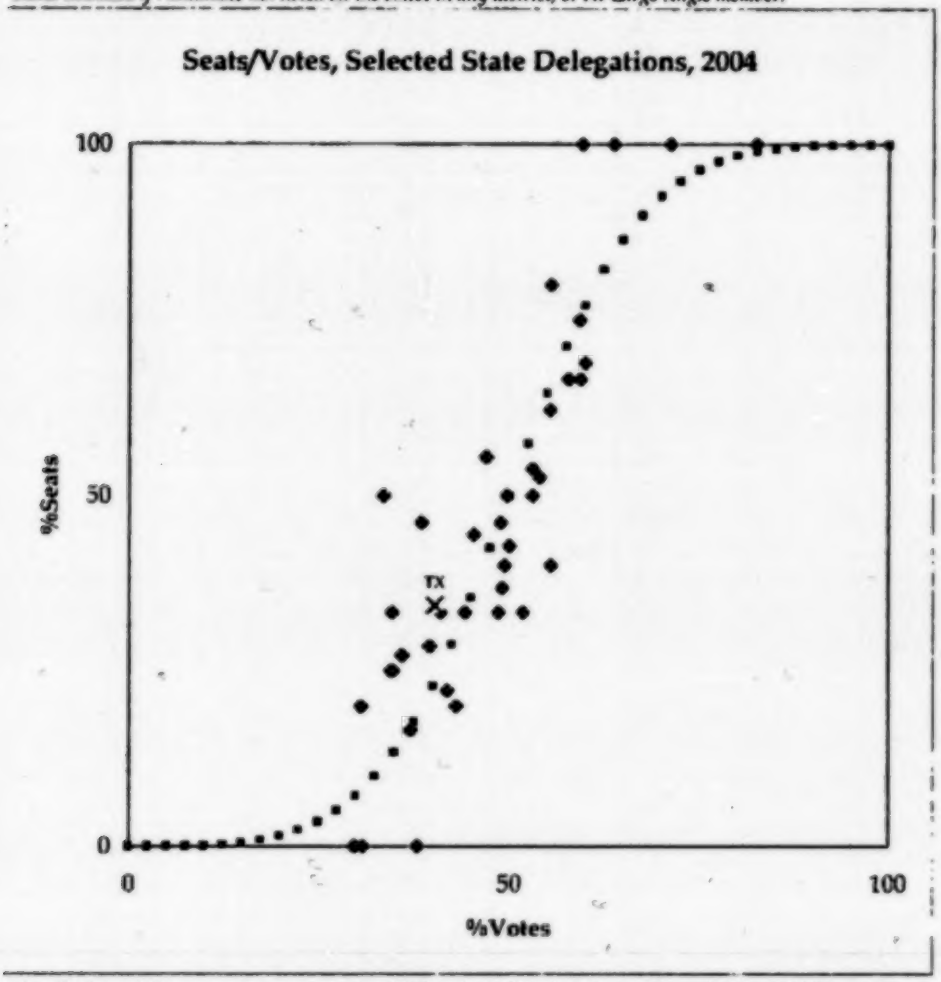
Year	D %Maj Vote	D% TotSeats	Year	D %Maj Vote	D% TotSeats
1982	56.0	61.8	1994	46.5	46.9
1984	52.6	58.2	1996	50.2	47.6
1986	55.1	59.3	1998	49.3	48.5
1988	54.0	59.8	2000	49.8	48.7
1990	54.2	61.4	2002	47.6	47.1
1992	52.7	59.3	2004	48.6	46.4

Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-22.**

Based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Appendix

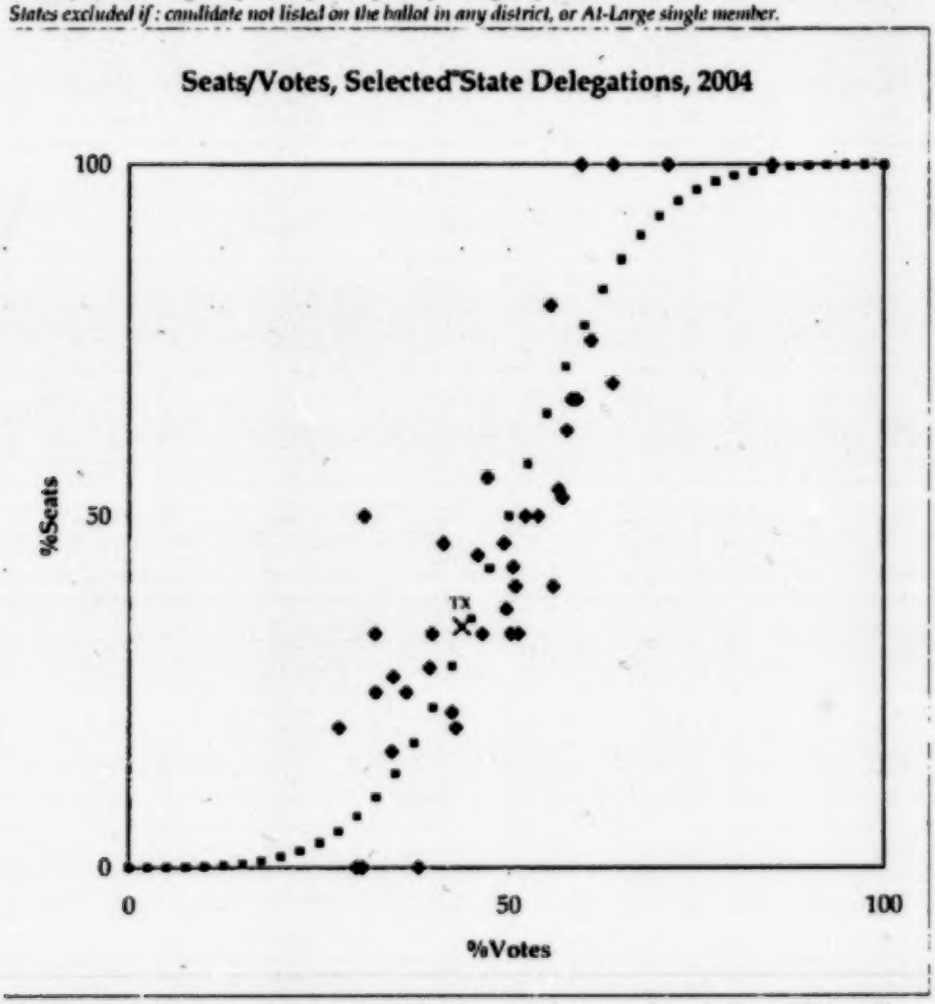
St	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats	D S/V %Dif
AL	39.5	28.5	2	5	39.6	28.5	-28.0
AK	22.4	0.0	0	1	23.9	0.0	-100.0
AZ	31.9	25.0	2	6	34.6	25.0	-27.7
AR	n/a	75.0	3	1	n/a	75.0	n/a
CA	53.6	62.2	33	20	55.4	62.2	12.3
CO	48.6	42.8	3	4	50.0	42.8	-14.4
CT	55.0	40.0	2	3	55.5	40.0	-27.9
DE	29.6	0.0	0	1	30.0	0.0	-100.0
FL	n/a	28.0	7	18	n/a	28.0	n/a
GA	38.5	46.1	6	7	38.5	46.1	19.7
HI	62.8	100.0	2	0	63.8	100.0	56.7
ID	29.8	0.0	0	2	29.8	0.0	-100.0
IL	53.6	52.6	10	9	54.0	52.6	-2.6
IN	41.3	22.2	2	7	41.9	22.2	-47.0
IA	42.8	20.0	1	4	43.1	20.0	-53.6
KS	33.4	25.0	1	3	34.8	25.0	-28.2
KY	36.8	16.6	1	5	37.1	16.6	-55.3
LA	n/a	28.5	2	5	n/a	28.5	n/a
ME	58.9	100.0	2	0	59.6	100.0	67.8
MD	58.2	75.0	6	2	59.3	75.0	26.5
MA	79.8	100.0	10	0	82.5	100.0	21.2
MI	48.1	40.0	6	9	49.1	40.0	-19.0
MN	51.4	50.0	4	4	53.1	50.0	-5.8
MS	29.9	50.0	2	2	33.6	50.0	48.8
MO	44.7	44.4	4	5	45.4	44.4	-2.2
MT	32.7	0.0	0	1	33.7	0.0	-100.0
NE	30.1	0.0	0	3	30.9	0.0	-100.0
NV	42.1	33.3	1	2	44.2	33.3	-24.7
NH	37.3	0.0	0	2	38.0	0.0	-100.0
NJ	52.4	53.8	7	6	53.1	53.8	1.3
NM	51.8	33.3	1	2	51.8	33.3	-35.7
NY	59.1	68.9	20	9	60.0	68.9	14.8
NC	48.9	46.1	6	7	48.9	46.1	-5.7
ND	59.5	100.0	1	0	59.5	100.0	68.1
OH	48.5	33.3	6	12	48.6	33.3	-31.5
OK	28.3	20.0	1	4	30.7	20.0	-34.9
OR	53.7	80.0	4	1	55.5	80.0	44.1
PA	48.1	36.8	7	12	49.1	36.8	-25.1
RI	69.4	100.0	2	0	71.2	100.0	40.4
SC	33.8	33.3	2	4	34.7	33.3	-4.0
SD	53.3	100.0	1	0	53.7	100.0	86.2
TN	46.3	55.5	5	4	47.0	55.5	18.1
TX	39.0	34.3	11	21	40.3	34.3	-14.9
UT	39.7	33.3	1	2	41.0	33.3	-18.8
VT	7.1	0.0	0	0	22.6	n/a	n/a
VA	34.0	27.2	3	8	36.0	27.2	-24.4
WA	58.9	66.6	6	3	59.4	66.6	12.1
WV	37.3	66.6	2	1	57.8	66.6	15.2
WI	48.3	50.0	4	4	49.7	50.0	0.6
WY	41.8	0.0	0	1	43.0	0.0	-100.0
			202	232			

Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-23.**

Based upon the Average % of the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Average

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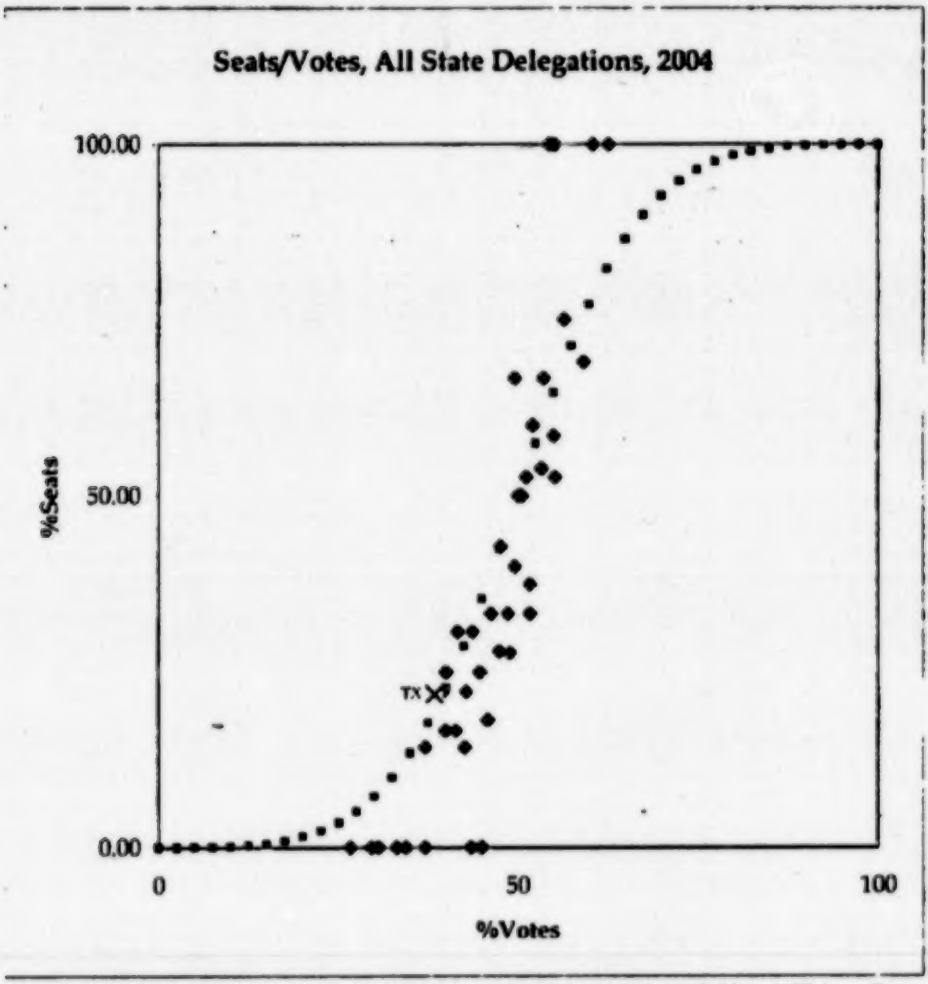
Appendix

Sta	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats	D S/V %Dif
AL	39.5	28.5	2	5	39.6	28.5	-28.0
AK	22.4	0.0	0	1	23.9	0.0	-100.0
AZ	31.9	25.0	2	6	36.5	25.0	-31.5
AR	n/a	75.0	3	1	n/a	75.0	n/a
CA	53.5	62.2	33	20	57.7	62.2	7.8
CO	48.8	42.8	3	4	50.6	42.8	-15.4
CT	55.0	40.0	2	3	55.9	40.0	-28.4
DE	29.6	0.0	0	1	30.1	0.0	-100.0
FL	n/a	28.0	7	18	n/a	28.0	n/a
GA	38.5	46.1	6	7	41.4	46.1	11.4
HI	62.8	100.0	2	0	63.9	100.0	56.5
ID	29.8	0.0	0	2	29.9	0.0	-100.0
IL	53.6	52.6	10	9	57.1	52.6	-7.9
IN	41.3	22.2	2	7	42.5	22.2	-47.8
IA	42.8	20.0	1	4	43.0	20.0	-53.5
KS	33.4	25.0	1	3	32.5	25.0	-23.1
KY	36.8	16.6	1	5	34.6	16.6	-52.0
LA	n/a	28.5	2	5	n/a	28.5	n/a
ME	58.9	100.0	2	0	59.6	100.0	67.8
MD	58.2	75.0	6	2	60.9	75.0	23.2
MA	79.8	100.0	10	0	85.1	100.0	17.3
MI	48.4	40.0	6	9	50.9	40.0	-21.4
MN	51.4	50.0	4	4	53.9	50.0	-7.2
MS	29.9	50.0	2	2	31.0	50.0	61.3
MO	44.7	44.4	4	5	45.9	44.4	-3.3
MT	32.7	0.0	0	1	33.7	0.0	-100.0
NE	30.1	0.0	0	3	30.7	0.0	-100.0
NV	42.1	33.3	1	2	46.5	33.3	-28.4
NH	37.3	0.0	0	2	38.1	0.0	-100.0
NJ	52.4	53.8	7	6	56.6	53.8	-4.9
NM	51.9	33.3	1	2	51.3	33.3	-35.1
NY	59.1	68.9	20	9	63.8	68.9	8.0
NC	48.9	46.1	6	7	49.4	46.1	-6.7
ND	59.5	100.0	1	0	59.6	100.0	67.8
OH	48.5	33.3	6	12	50.3	33.3	-33.8
OK	28.3	20.0	1	4	27.6	20.0	-27.5
OR	53.7	80.0	4	1	55.5	80.0	44.1
PA	48.1	36.8	7	12	49.7	36.8	-26.0
RI	69.4	100.0	2	0	71.2	100.0	40.4
SC	33.8	33.3	2	4	32.4	33.3	2.8
SD	53.3	100.0	1	0	53.8	100.0	85.9
TN	46.5	55.5	5	4	47.2	55.5	17.6
TX	39.0	34.3	11	21	43.8	34.3	-21.7
UT	39.7	33.3	1	2	39.9	33.3	-16.5
VT	7.1	0.0	0	0	22.6	n/a	n/a
VA	34.0	27.2	3	8	34.8	27.2	-21.8
WA	58.9	66.6	6	3	59.0	66.6	12.9
WV	57.5	66.6	2	1	58.3	66.6	14.2
WI	48.5	50.0	4	4	52.2	50.0	-4.2
WY	41.8	0.0	0	1	43.1	0.0	-100.0
			202	232			

Appendix

Seats Won compared to Votes Received, Pres. By C.D.
Based upon the Major Party Statewide Vote for President for the DEMOCRATS

Chart TX-24.
Curve value is 3



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Appendix

Sta	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats
AL	36.8	14.3	1	6	37.1	14.3
AK	35.5	0.0	0	1	36.7	0.0
AZ	44.4	25.0	2	6	44.7	25.0
AR	44.5	0.0	0	4	45.0	0.0
CA	54.3	58.5	31	22	55.0	58.5
CO	47.0	42.9	3	4	47.6	42.9
CT	54.3	100.0	5	0	55.2	100.0
DE	53.3	0.0	1	0	53.8	100.0
FL	47.0	28.0	7	18	47.4	28.0
GA	41.4	30.8	4	9	41.6	30.8
HI	54.0	100.0	2	0	54.4	100.0
ID	30.2	0.0	0	2	30.6	0.0
IL	54.8	52.6	10	9	55.2	52.6
IN	39.2	22.2	2	7	39.5	22.2
IA	49.2	40.0	2	3	49.6	40.0
KS	36.6	0.0	0	4	37.1	0.0
KY	39.6	16.7	1	5	39.9	16.7
LA	42.2	14.3	1	6	42.6	14.3
ME	53.5	100.0	2	0	54.5	100.0
MD	55.9	75.0	6	2	56.5	75.0
MA	61.9	100.0	10	0	62.7	100.0
MI	51.2	33.3	5	10	51.7	33.3
MN	51.0	37.5	3	5	51.7	37.5
MS	39.7	25.0	1	3	40.0	25.0
MO	46.1	33.3	3	6	46.3	33.3
MT	38.5	0.0	0	1	39.5	0.0
NE	32.6	0.0	0	3	33.1	0.0
NV	47.8	33.3	1	2	48.6	33.3
NH	50.2	50.0	1	1	50.6	50.0
NJ	52.9	53.8	7	6	53.3	53.8
NM	49.0	66.7	2	1	49.6	66.7
NY	58.3	69.0	20	9	59.2	69.0
NC	43.5	30.8	4	9	43.7	30.8
ND	35.5	0.0	0	1	36.0	0.0
OH	48.7	27.8	5	13	48.9	27.8
OK	34.4	0.0	0	5	34.4	0.0
OR	51.3	60.0	3	2	52.1	60.0
PA	50.9	52.6	10	9	51.2	52.6
RI	59.4	100.0	2	0	60.5	100.0
SC	40.9	16.7	1	5	41.3	16.7
SD	38.4	0.0	0	1	39.0	0.0
TN	42.5	22.2	2	7	42.8	22.2
TX	38.2	21.9	7	25	38.4	21.9
UT	26.0	0.0	0	3	26.6	0.0
VT	58.9	0.0	1	0	60.3	100.0
VA	45.4	18.2	2	9	45.8	18.2
WA	52.8	66.7	6	3	53.6	66.7
WV	43.2	0.0	0	3	43.5	0.0
WI	49.7	50.0	4	4	50.1	50.0
WY	29.0	0.0	0	1	29.6	0.0

States indicated on the chart by an "X" are underlined in this table.

Appendix

Falses Cases in Congressional Elections, All States, 2004

Chart TX-41.
Curve value is 3

Delegations classified by number of districts involved to change seats/votes status

"False Negative": less than a majority of the votes but a majority of the seats
"False Positive": a majority of the votes but less than a majority of the seats
Cases with either 50% of votes or 50% of seats are underlined.

1) Pct. Major Party	Delegation	D %MP Vote	D % Seats	Status	Notes
A) Even Number of Districts; delegation split 50/50					
	Minnesota	53.1	50.0	False Positive	4D, 4R
	Mississippi	33.6	50.0	False Negative	2D, 2R
	Wisconsin	49.7	50.0	False Negative	4D, 4R
B) Odd Number of Districts; delegation controlled by 1 seat					
	Colorado	50.0	42.8	False Positive	3D, 4R
	Connecticut	55.5	40.0	False Positive	2D, 3R
	Tennessee	47.0	55.5	False Negative	5D, 4R
	New Mexico	51.8	33.3	False Positive	1D, 2R
C) Even or Odd Number of Districts; delegation controlled by more than 1 seat					
	None				

2) Avg. Maj. Party	Delegation	D %MP Vote	D % Seats	Status	Notes
A) Even Number of Districts; delegation split 50/50					
	Minnesota	52.9	50.0	False Positive	4D, 4R
	Mississippi	31.0	50.0	False Negative	2D, 2R
	Wisconsin	52.2	50.0	False Positive	4D, 4R
B) Odd Number of Districts; delegation controlled by 1 seat					
	Connecticut	55.9	40.0	False Positive	2D, 3R
	Tennessee	47.2	55.5	False Negative	5D, 4R
	New Mexico	51.3	33.3	False Positive	1D, 2R
	Colorado	50.3	33.3	False Positive	3D, 4R
C) Even or Odd Number of Districts; delegation controlled by more than 1 seat					
	Ohio	50.3	33.3	False Positive	6D, 12R
	Michigan	50.5	40.0	False Positive	6D, 9R

3) Pres. By C.D.	Delegation	D %MP Vote	D % Seats	Status	Notes
A) Even Number of Districts; delegation split 50/50					
	Wisconsin	50.7	50.0	False Positive	4D, 4R
	N. Hampshire	50.6	50.0	False Positive	1D, 1R
B) Odd Number of Districts; delegation controlled by 1 seat					
	New Mexico	49.6	66.7	False Negative	2D, 1R
C) Even or Odd Number of Districts; delegation controlled by more than 1 seat					
	Michigan	51.7	33.3	False Positive	5D, 10R
	Minnesota	51.7	37.5	False Positive	3D, 5R

Appendix

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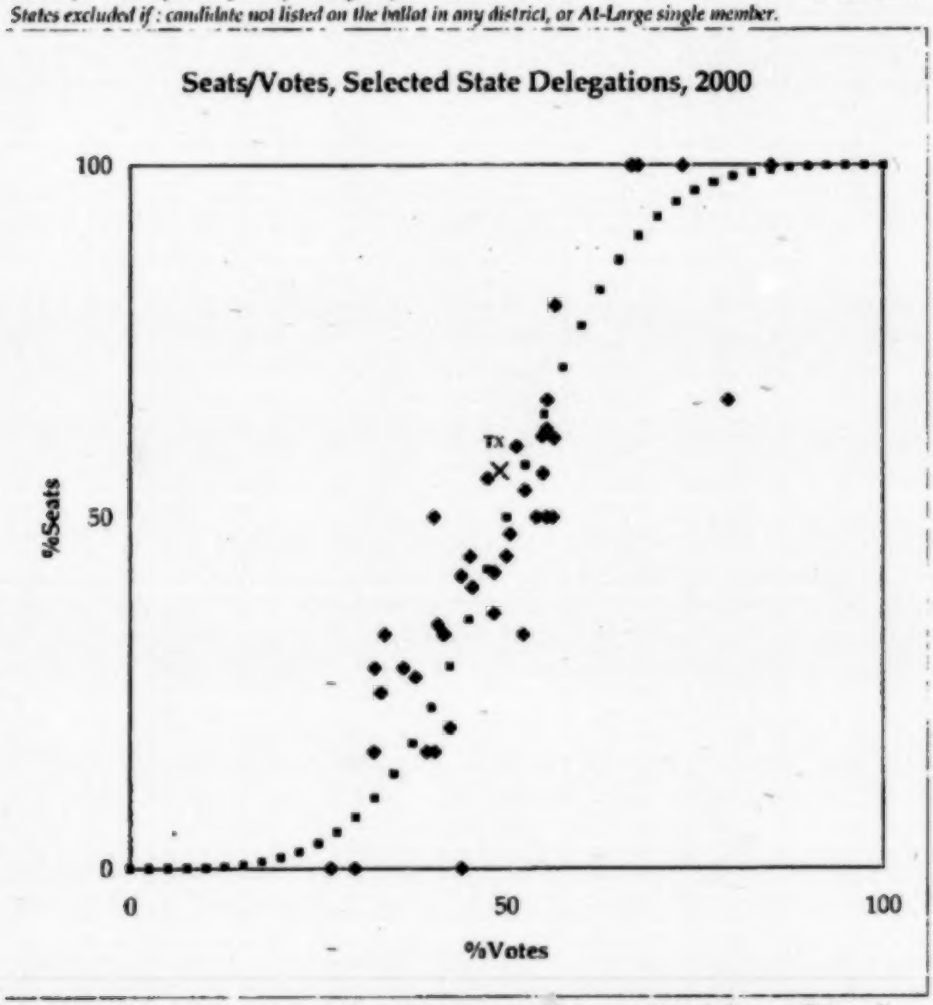
Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-51.**

Based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (see p.2).

Appendix

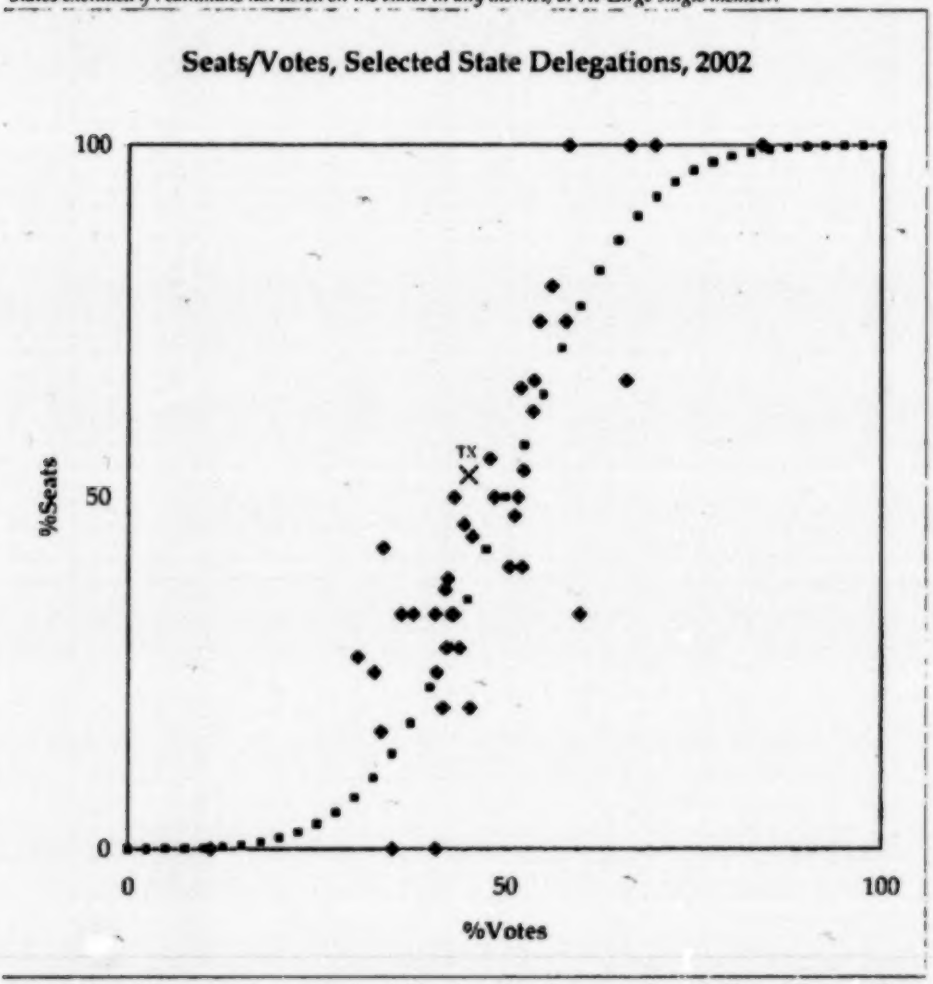
Sta	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PlySeats	D S/V %Dif
AL	33.9	28.5	2	5	36.3	28.5	-21.5
AK	16.5	0.0	0	1	19.2	0.0	-100.0
AZ	38.0	16.6	1	5	39.4	16.6	-57.9
AR	n/a	75.0	3	1	n/a	75.0	n/a
CA	51.8	61.5	32	20	54.8	61.5	12.2
CO	50.5	33.3	2	4	53.8	33.3	-1.5
CT	53.2	50.0	3	3	54.0	50.0	-7.4
DE	30.8	0.0	0	1	31.3	0.0	-100.0
FL	39.4	34.7	8	15	40.9	34.7	-15.2
GA	37.9	27.2	3	8	37.9	27.2	-28.2
HI	65.0	100.0	2	0	66.6	100.0	50.2
ID	28.8	0.0	0	2	29.9	0.0	-100.0
IL	55.8	50.0	10	10	56.2	50.0	-11.0
IN	44.2	40.0	4	6	45.5	40.0	-12.1
IA	41.6	20.0	1	4	42.5	20.0	-52.9
KS	31.6	25.0	1	3	33.3	25.0	-24.9
KY	39.1	16.6	1	5	40.5	16.6	-59.0
LA	29.8	28.5	2	5	32.5	28.5	-12.3
ME	66.2	100.0	2	0	67.5	100.0	48.1
MD	55.1	50.0	4	4	55.3	50.0	-9.6
MA	84.3	100.0	10	0	85.1	100.0	17.5
MI	53.5	56.2	9	7	54.9	56.2	2.4
MN	52.2	62.5	5	3	55.4	62.5	12.8
MS	30.2	60.0	3	2	31.4	60.0	16.7
MO	48.8	44.4	4	5	50.0	44.4	-11.2
MT	46.2	0.0	0	1	47.3	0.0	-100.0
NE	26.0	0.0	0	3	26.7	0.0	-100.0
NV	38.4	50.0	1	1	40.4	50.0	23.8
NH	42.9	0.0	0	2	44.0	0.0	-100.0
NJ	51.2	53.8	7	6	52.5	53.8	2.5
NM	51.0	33.3	1	2	52.2	33.3	-36.2
NY	54.7	61.2	19	12	56.4	61.2	8.5
NC	42.9	41.6	5	7	44.0	41.6	-3.5
ND	32.9	100.0	1	0	34.3	100.0	84.2
OH	45.7	42.1	8	11	48.4	42.1	-13.0
OK	30.9	16.6	1	5	32.4	16.6	-48.8
OR	54.9	80.0	4	1	56.5	80.0	41.6
PA	50.0	47.6	10	11	50.5	47.6	-5.7
RI	64.4	100.0	2	0	73.4	100.0	36.2
SC	39.7	33.3	2	4	41.8	33.3	-20.3
SD	24.8	0.0	0	1	25.3	0.0	-100.0
TN	44.2	44.4	4	5	45.2	44.4	-1.8
TX	47.0	56.6	17	13	49.1	56.6	15.3
UT	40.1	33.3	1	2	41.6	33.3	-20.0
VT	0.0	0.0	0	0	0.0	n/a	n/a
VA	43.9	36.3	4	6	48.3	40.0	-17.2
WA	52.2	66.6	6	3	55.5	66.6	20.0
WV	72.5	66.6	2	1	79.4	66.6	-16.1
WI	47.4	55.5	5	4	47.5	55.5	16.8
WY	28.5	0.0	0	1	29.9	0.0	-100.0
Sum			212	221			

Appendix

Seats Won compared to Votes Received, State Delegations **Chart TX-52.**

Based upon the Major Party Vote for Congress for the DEMOCRATS Curve value is 3

States excluded if : candidate not listed on the ballot in any district, or At-Large single member.



Note: Each symbol represents one congressional delegation; selected states may be marked by an "X" (sc: p.2).

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Appendix

St	D% TotVote	D% TotSeats	D Seats	R Seats	D% MajVote	D% PtySeats	D S/V %Dif
AL	40.0	28.5	2	5	42.3	28.5	-32.5
AK	17.3	0.0	0	1	18.8	0.0	-100.0
AZ	39.5	25.0	2	6	40.9	25.0	-38.9
AR	56.9	75.0	3	1	58.0	75.0	29.3
CA	51.4	62.2	33	20	53.6	62.2	16.0
CO	42.2	28.5	2	5	43.9	28.5	-35.1
CT	51.4	40.0	2	3	52.2	40.0	-23.4
DE	26.7	0.0	0	1	27.0	0.0	-100.0
FL	n/a	28.0	7	18	n/a	28.0	n/a
GA	42.4	38.4	5	8	42.4	38.4	-9.4
HI	64.5	100.0	2	0	66.5	100.0	50.4
ID	34.0	0.0	0	2	35.0	0.0	-100.0
IL	50.7	47.3	9	10	51.2	47.3	-7.6
IN	42.1	33.3	3	6	43.2	33.3	-22.9
IA	44.8	20.0	1	4	45.3	20.0	-55.8
KS	31.3	25.0	1	3	32.6	25.0	-23.3
KY	32.0	16.6	1	5	33.5	16.6	-50.4
LA	27.5	42.8	3	4	33.8	42.8	26.6
ME	58.4	100.0	2	0	58.4	100.0	71.2
MD	54.5	75.0	6	2	54.5	75.0	37.6
MA	83.4	100.0	10	0	84.0	100.0	19.0
MI	49.3	40.0	6	9	50.5	40.0	-20.8
MN	49.9	50.0	4	4	51.6	50.0	-3.1
MS	47.2	50.0	2	2	48.5	50.0	3.1
MO	44.7	44.4	4	5	45.6	44.4	-2.6
MT	32.6	0.0	0	1	33.5	0.0	-100.0
NE	9.8	0.0	0	3	10.8	0.0	-100.0
NV	34.2	33.3	1	2	36.2	33.3	-8.0
NH	39.7	0.0	0	2	40.8	0.0	-100.0
NJ	51.3	53.8	7	6	52.4	53.8	2.7
NM	59.9	33.3	1	2	59.9	33.3	-44.4
NY	50.3	65.5	19	10	52.0	65.5	26.0
NC	43.2	46.1	6	7	44.5	46.1	3.6
ND	52.4	100.0	1	0	52.4	100.0	90.8
OH	42.1	33.3	6	12	42.8	33.3	-22.2
OK	39.1	20.0	1	4	41.7	20.0	-52.0
OR	54.6	80.0	4	1	56.1	80.0	42.6
PA	40.7	36.8	7	12	42.0	36.8	-12.4
RI	68.4	100.0	2	0	69.8	100.0	43.3
SC	35.2	33.3	2	4	37.8	33.3	-11.9
SD	45.6	0.0	0	1	46.0	0.0	-100.0
TN	46.3	55.5	5	4	47.9	55.5	15.9
TX	43.8	53.1	17	15	45.1	53.1	17.7
UT	39.7	33.3	1	2	40.7	33.3	-18.2
VT	0.0	0.0	0	0	0.0	n/a	n/a
VA	29.3	27.2	3	8	30.4	27.2	-10.5
WA	52.1	66.6	6	3	53.8	66.6	23.8
WV	66.0	66.6	2	1	66.0	66.6	0.9
WI	41.4	50.0	4	4	43.2	50.0	15.7
WY	36.2	0.0	0	1	37.4	0.0	-100.0
Sums			205	229			

Appendix

Seats Won compared to Votes Received

Chart TX-71.
Curve value is 3

Votes based upon the Aggregate Congressional Totals for ALL STATES.
Source: House Clerk Biennial Reports.

Subtable 1. Vote Totals and Percentages

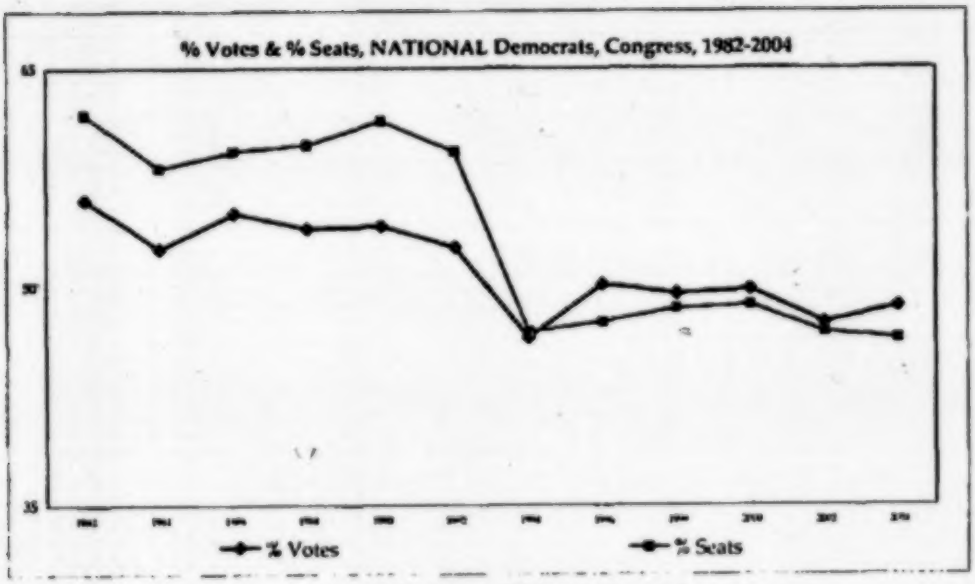
Year	Votes for Democrats	Votes for Republicans	Votes for All Others	Votes for All Candidates	Votes for Major Parties	% of All Votes Democrats	% of Maj. Pty. Democrats	% of All Votes Republicans	% of Maj. Pty. Republicans
1982	35,126,426	27,606,814	1,148,424	63,880,844	62,732,420	55.0	56.0	43.2	44.0
1984	42,799,080	38,540,762	1,082,016	82,421,858	81,339,822	51.9	52.6	46.8	47.4
1986	32,338,342	26,384,080	1,035,972	59,758,397	58,722,425	54.1	55.1	44.2	44.9
1988	43,473,080	37,015,851	1,193,254	81,682,183	80,488,931	53.2	54.0	45.3	46.0
1990	32,597,772	27,402,856	2,556,895	62,554,053	59,799,768	52.0	54.2	43.9	45.8
1992	48,350,096	43,499,813	5,150,203	97,198,316	92,048,113	49.9	52.7	44.8	47.3
1994	31,542,423	36,329,809	2,623,816	70,495,648	67,868,632	44.7	46.5	51.5	53.5
1996	43,393,580	43,120,872	3,719,015	90,233,467	86,514,452	48.1	50.2	47.8	49.8
1998	31,391,834	31,983,612	3,329,356	66,604,802	63,375,446	47.1	49.5	48.0	50.5
2000	46,411,359	46,750,175	5,636,229	98,799,763	93,161,734	47.0	49.8	47.3	50.2
2002	39,642,342	37,099,370	3,973,149	74,708,393	70,735,412	45.0	47.6	49.6	52.4
2004	52,745,121	55,713,412	4,733,753	113,192,286	109,458,533	46.6	48.6	49.2	51.4

Subtable 2. Percentage of Seats Expected based upon Seats-Votes Curve

Year	% of All Votes Democrats	Expected % Seats	% of Maj. Pty. Democrats	Expected % Seats	% of All Votes Republicans	Expected % Seats	% of Maj. Pty. Republicans	Expected % Seats
1982	55.0	64.8	56.0	67.3	43.2	30.6	44.0	32.7
1984	51.9	55.8	52.6	57.8	46.8	40.4	47.4	42.2
1986	54.1	62.1	55.1	64.8	44.2	33.1	44.9	35.2
1988	53.2	59.6	54.0	61.8	45.3	36.9	46.0	38.2
1990	52.0	53.9	54.2	62.3	43.9	32.5	45.8	37.7
1992	49.9	49.9	52.7	58.2	44.8	34.7	47.3	41.9
1994	44.7	34.7	46.5	39.6	51.5	54.6	53.5	60.4
1996	48.1	44.3	50.2	50.3	47.8	43.4	49.8	49.5
1998	47.1	41.3	49.5	48.6	48.0	44.1	50.5	51.4
2000	47.0	41.0	49.8	49.3	47.3	42.0	50.2	50.5
2002	45.0	35.5	47.6	42.7	49.6	49.0	52.4	57.3
2004	46.6	39.9	48.6	45.9	49.2	47.7	51.4	54.1

(chart, to 71 ch. page 1)

Appendix



Year	D % Votes	D % Seats
1982	56.0	61.8
1984	52.6	58.2
1986	55.1	59.3
1988	54.0	59.8
1990	54.2	61.4
1992	52.7	59.3
1994	46.5	46.9
1996	50.2	47.6
1998	49.5	48.5
2000	49.8	48.7
2002	47.6	46.9
2004	48.6	46.4

(chart, to 75, cls. page 2)

Appendix

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Supreme Court, U.S.
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Nos. 05-204, 05-254, 05-276, and 05-439

In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,
v.
RICK PERRY, *et al.*, Appellees.

TRAVIS COUNTY, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

EDDIE JACKSON, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

GI FORUM OF TEXAS, *et al.*, Appellants,
v.
RICK PERRY, *et al.*, Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF SAMUEL ISSACHAROFF, BURT NEUBORNE, AND RICHARD H. PILDES AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI CURIAE

The individual *amici* are Professors of Law who have devoted much of their careers to the study of the law of democracy.[1] We believe that the near elimination of competitive congressional elections in recent redistrictings, caused by nationwide political gerrymandering by both major political parties, erodes one of the structural foundations of the Constitution: representative self-government through competitive elections that hold representatives accountable to voters. Until now, this Court has struggled to analyze the dysfunction caused by political gerrymandering as a potential violation of the Equal Protection Clause. We respectfully submit this brief *amici curiae* to invite the Court's attention to an alternative analytical approach premised on constitutional protection of the essential foundation of representative self-government: electoral accountability through competitive elections.

INTRODUCTION

For over 40 years, the Equal Protection Clause has served as the principal constitutional vehicle for intensive judicial involvement in protecting the right to vote and to run for office.[2] This Court's insistence on rigorous compliance with principles of formal electoral equality has provided — and continues to provide — an essential foundation for American democracy. In the last decade, however, it has become clear that formal political equality can co-exist with suppression of the single most important element of democratic self-

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored any part of this brief, and no one other than *amici* has made a monetary contribution to its preparation or submission, except for the assistance of Mayer, Brown, Rowe & Maw LLP in the formal production and filing of this brief.

[2] See *Kramer* v. *Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper* v. *Va. Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962).

governance — competitive elections in which voters can hold their representatives electorally accountable.

When a state legislature designs a congressional apportionment that satisfies the formal mathematical norms of "one-person one-vote," but intentionally dispenses with competitive elections in virtually every congressional district — as in these appeals — the lens of formal equality fails to reveal the nature of the constitutional injury. Nor is that injury fully addressed in a search for a "fair" allocation of the political spoils between the political parties. Rather, the constitutional violation lies in the structural harm to representative self-government that results when state legislatures abuse their powers under the Elections Clause, Article I, § 4, and deliberately suppress competitive elections in systematic fashion.

To ensure that all elections are competitive is, of course, impossible. A natural political advantage enjoyed by one or another political faction in a geographical area may render election outcomes a foregone conclusion. Nothing in the Constitution or in democratic political theory guarantees a perennial political minority anything other than a fair chance to persuade the political majority and continued enjoyment of equal treatment under law. But as evident from the redistricting in this case — and the design of 90% of congressional districts nationwide — a lethal combination of modern technology, partisanship, and incumbent self-dealing renders it possible for state legislatures to assure that nearly all congressional elections are non-competitive.

Even as the parties dispute the distributional equity of one or another districting plan, the undeniable fact of modern political life is the virtual disappearance of competitive congressional elections. The post-redistricting elections in 2002 were the least competitive in American history: challengers defeated only four congressional incumbents. Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 POL. SCI. Q. 1, 10-11 (2003). More

than one-third of state congressional delegations did not change at all.[3] There were 338 incumbents who won by more than a 20-point margin, the generally accepted definition of a "landslide."[4] There were only 38 minimally competitive districts nationwide, using the generally accepted definition of less than a 10-point margin of victory (and even many of those districts were designed by commissions, not partisan legislatures).[5] These figures reflect a dramatic decline from previous decades in competitiveness.[6]

This lack of competitive elections for Congress does not reflect a dramatic sea change in the electorate's partisan preferences. While only one of eleven House elections was decided by less than ten percentage points, fully half of state governorships and Senate seats contested on the same day — in elections impervious to political gerrymandering — were instead competitive enough to be decided by less than this ten-point margin.[7] As one of the leading political science analysts of congressional elections puts it: "Redistricting patterns are a major reason for the dearth of competitive races in 2002 and help to explain why 2002 produced the smallest number of successful House challenges (four) of any general

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[3] These numbers were compiled from the following sources: CQ's POLITICS IN AMERICA 2004: THE 108TH CONGRESS (David Hawkings & Brian Nutting eds. 2003); MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004 (2003); Clerk of the House of Representatives, *Statistics of the Congressional Election of November 5, 2002* (2003), at http://clerk.house.gov/members/electionInfo/2002election.pdf ("*2002 Election Statistics*").

[4] See Table 1, *infra*.

[5] See CQ's POLITICS IN AMERICA 2004, *supra*. On the effects of commission rather than legislative redistricting, see pages 17-18, *infra*.

[6] See Table 1, *infra*.

[7] Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L.J. 179, 183 (2003) (assembling statistics).

election in U.S. history." Jacobson, *supra*, 118 POL. SCI. Q. at 10-11.

The virtual elimination of competitive congressional elections is no accident. State legislatures have orchestrated this disappearance using two forms of political gerrymandering. The first is the partisan gerrymander, such as the Texas plan before the Court, in which a faction with transitory dominance draws district lines to maximize its party's political advantage at the expense of the minority party. The second kind is the "sweetheart," bipartisan gerrymander, in which the two major parties work as a cartel and risk-aversely agree to allocate political representation to protect as many incumbents as possible.[8] Common to each form is intentional state legislative action to minimize the risk of competitive elections or eliminate that risk altogether. These tactics are effective. Even during the decades of gross malapportionment, disfranchisement, and a virtual Democratic Party monopoly on political power in the South, incumbents still lost 10-11% of the time on average during, for example, the 1930s and 1940s — as compared to 1.8% in the 2000s so far.[9]

None of the equal-protection arguments about the partisan implications of one or another districting plan captures the full insult to the constitutional commitment of electoral accountability that state legislative creation of overwhelmingly "safe" congressional districts entails. In California, for example, not a single challenger in the 2002 congressional general election received over 40% of the vote. *Id.* at 182. Political actors facing such an absence of electoral competi-

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[8] Experts characterize California, New York, Illinois, and Ohio (with a combined total of 119 seats) as having adopted bipartisan gerrymanders in which nearly all seats were protected, though both California (Democratic) and Ohio (Republican) were nominally under unified party control. Barone & Cohen, *supra*, at 44.

[9] HAROLD W. STANLEY & RICHARD G. NIEMI, VITAL STATISTICS ON AMERICAN POLITICS 2005-2006 47 (2006) (Table 1-14).

tion well understand that the power to "choose" representatives in "elections" resides, not in "the People," but in what this Court has elsewhere termed a "self-perpetuating body" of self-dealing insiders. *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 793 n.10 (1995). One need look no further for proof than this unabashed admission regarding California redistricting by Rep. Loretta Sanchez, in which she describes the role of redistricting czar Michael Berman, the leading consultant to the controlling Democratic Party in drawing the new district lines:

> So Rep. Loretta Sanchez of Santa Ana said she and the rest of the Democratic congressional delegation went to Berman and made their own deal. Thirty of the 32 Democratic incumbents have paid Berman $20,000 each, she said, for an "incumbent-protection plan." "Twenty thousand is nothing to keep your seat," Sanchez said. "I spend $2 million (campaigning) every election. If my colleagues are smart, they'll pay their $20,000, and Michael will draw the district they can win in. Those who have refused to pay? God help them.[10]

No political actor seeking such a path to electoral sinecure has an incentive to bring before this Court the full constitutional harm that political gerrymandering of this sort imposes.

Not surprisingly, the arguments raised by the parties in political gerrymandering cases have involved claims of partisan excess and unequal treatment. The arguments have been accompanied by a complex set of formulae for distinguishing excessive partisanship from ordinary politics, ranging from the "consistent degradation" test of *Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986) (plurality), to the statistical models of increasing complexity offered in *Vieth* v. *Jubelirer*, 541 U.S.

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[10] H. Quach & D. Bunis, *All Bow to Redistrict Architect*, ORANGE COUNTY REGISTER, Aug. 26, 2001, at A1.

267 (2004). Such an equality-based effects approach to political gerrymandering requires the judicial construction of an undistorted, "fair" representational baseline against which the gerrymander may be tested. While the dissenters in *Vieth* sought to construct such a baseline, either district-by-district or statewide, the plurality in *Vieth* concluded that the difficulty of judicially determining an ideal hypothetical outcome to an election should limit the judicial role to the preservation of formal equality norms.

But the Equal Protection Clause, focused on alleged discrimination between the political parties, is not designed to address the full constitutional harms at stake in the systematic, intentional elimination of electoral competition and accountability. The Elections Clause, U.S. CONST. art. I, § 4, cl. 1, which grants the States enumerated powers to regulate national elections only for legitimate purposes, is. *Amici* submit that this alternative analytical approach best reflects the structural constitutional values at issue in this case.

SUMMARY OF ARGUMENT

The Constitution contains at least three textual provisions that prohibit state legislative efforts to systematically design non-competitive congressional election districts and frustrate the Constitution's essential requirement that members of Congress be electorally accountable to the voters.

First, the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, delegates power to state legislatures to establish only the "times, places and manner" of congressional elections. Just as Article I's grants of enumerated powers to Congress necessarily limit the exercise of those powers to the reasons for which granted, the specific and limited delegation of power in the Elections Clause does not license state legislatures to eviscerate competitive congressional elections and undermine electoral accountability. Yet the systematic creation of overwhelmingly "safe" election districts on behalf of partisan allies does precisely that. The question before the Court

should not be simply whether, under the Equal Protection Clause, one of the major political parties has been unconstitutionally discriminated against in districting, but whether Texas or any other state has the constitutional power intentionally and systematically to insulate congressional candidates and incumbents from contested elections. The Elections Clause grants no such power.

This inherent limitation on state legislative authority over congressional elections is confirmed by two other provisions: Article I, § 2, which requires that the People (not the state legislatures) choose the members of Congress, and the First Amendment, which guarantees freedom of speech, assembly, association, and petition. Together with the Elections Clause, these provisions combine to prevent state legislatures from manipulating Congressional elections through the creation of overwhelmingly "safe" election districts. Under Article I, §§ 2 and 4, and the principle of representative self-government that motivates the First Amendment, the abuse of redistricting authority to turn congressional elections into empty rituals should be found unconstitutional.

Accordingly, just as this Court protects the structural imperatives of federalism and separation of powers, this Court should protect the Constitution's third great structural imperative — representative self-government through contested elections — from destruction at the hands of self-dealing political incumbents and their allies of both major parties. Manageable judicial standards to do so exist, including a bright-line rule, absent judicial order or extraordinary circumstance, against mid-decade redistricting.

ARGUMENT

I. Article I Of The Constitution Prohibits Anti-Competitive Political Gerrymanders That Virtually Eliminate Contested Congressional Elections And Substantially Diminish Electoral Accountability.

A. The Elections Clause Does Not Grant State Legislatures The Power Artificially To Eliminate Electoral Accountability And Competitive Congressional Elections.

The states' power to design congressional districts derives exclusively from the specifically enumerated grant of power in the Elections Clause, U.S. CONST. art. I, § 4, cl. 1. The states have no reserved or inherent powers over the regulation and design of congressional districts and elections. *Cook* v. *Gralike*, 531 U.S. 510, 522-23 (2001) ("No other constitutional provision [than the Elections Clause] gives the States authority over congressional elections * * *."); *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-34 (1995) (state authority over national elections exists only insofar as specifically delegated in the Elections Clause).

Just as the grant of enumerated powers in Article I to Congress limits the exercise of those powers to the scope and objectives for which granted, see, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 553 (1995), the constitutional grant of specifically enumerated power to the states over congressional districting limits the scope and aims for which those powers can be exercised. *Cook*, 531 U.S. at 523 ("The States may regulate the incidents of [congressional] elections, including balloting, only within the exclusive delegation of power under the Elections Clause"). This Court has indicated many times the importance of ensuring that Congress' powers are limited to the scope and aims for which the Constitution specifically enumerates the grant of particular powers. See, *e.g.*, *Bd. of Trustees* v. *Garrett*, 531 U.S. 356, 365 (2001); *United States* v. *Morrison*, 529 U.S. 598, 607, 620-21

(2000); *City of Boerne* v. *Flores*, 521 U.S. 507, 516 (1997); *Lopez*, 514 U.S. at 553. In exactly the same way, the Court should continue to recognize that, when state legislatures exercise power pursuant to a specifically enumerated grant in Article I, this power is limited to the scope and aims for which the Constitution grants it.

In particular, state legislatures have no delegated power under Article I to design congressional districts for the purpose and effect of destroying the electoral accountability between representatives and citizens that is essential to representative democracy. The Elections Clause does not grant states the power to regulate congressional elections with the aim and effect of artificially insulating members of Congress from electoral competition through state creation of overwhelmingly "safe," non-competitive congressional election districts. As this Court noted in *Term Limits*, 514 U.S. at 833-34, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional constraints." See also *Smiley* v. *Holm*, 285 U.S. 355, 366 (1932) (noting that the Elections Clause grants states the power to regulate national elections "as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right [to vote] involved").

The Elections Clause, like the Qualifications Clauses at issue in *Term Limits*, does not empower the states (or Congress) to design congressional districts in a way that "would lead to a self-perpetuating body to the detriment of the new Republic." 514 U.S. at 793 n.10. At the Constitutional Convention, James Madison noted the risk of leaving unfettered power in the hands of potentially self-interested political actors to regulate elections: "A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect." *Ibid.* (quoting *Powell* v. *McCormack*, 395 U.S. 486, 534

(1969) (in turn quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 250 (Max Farrand ed. 1911) (Madison))). This Court has constrained the ability of political bodies to manipulate electoral outcomes through gerrymandering voting ("the number authorized to elect") and vote-counting rules. See, *e.g.*, *Hunter* v. *Underwood*, 471 U.S. 222 (1985); *Bush* v. *Gore*, 531 U.S. 98 (2000). But artificially non-competitive election districts are now the most direct and devastatingly effective means of creating a "self-perpetuating body" in the House, in light of modern election-behavior data bases and sophisticated computer technology. The manipulation of district design to ensure artificially that one party or the other's congressional candidates face no meaningful competition on general election day is neither a necessary nor a proper exercise of the specific power delegated to the state legislatures in the Elections Clause.

This Court, and individual members of the Court, have recognized that numerous provisions of the Constitution were specifically designed to protect against even the *risk* of self-interested manipulation of the election process by those in power. That those temporarily in office will seek to leverage their power over election-rule design into more enduring power for themselves and their allies is eminently predictable. As Justice Scalia has noted, "the first instinct of power is the retention of power." *McConnell* v. *FEC*, 540 U.S. 93, 263 (2003) (concurring in part and dissenting in part). Similarly, Justice Thomas has observed that the structure of the Census and Apportionment Clauses reflected the Framers' realization that the danger of self-interested political manipulation of the Census and apportionment required that the Constitution "creat[e] a standard that would limit political chicanery." *Utah* v. *Evans*, 536 U.S. 452, 500 (2002) (dissenting).

If numerous provisions of the Constitution are understood to guard against the *risk* of self-interested manipulation of the election process, surely the Elections Clause prohibits the

actual, transparent, and even brazen self-interested manipulation involved in the willful creation of overwhelmingly "safe," non-competitive election districts that destroy electoral accountability. And unlike campaign-finance regulation or statistical sampling under the Census Clause, there can be no dispute about the purpose and effects of the current redistricting — and now, mid-decade redistricting — process: political insiders candidly admit that they intentionally design congressional districts to be overwhelmingly safe for partisan allies and incumbents. As the post-2002 redistricting elections demonstrate, these plans have achieved precisely that.

The Elections Clause does not empower state legislatures artificially to create overwhelmingly non-competitive congressional districting plans whose purpose and effect is overwhelmingly to insulate preferred candidates from electoral accountability. As noted above, not all districted elections can be made competitive. But just as there is a difference between natural and illegal economic monopolies, there is a difference between safe districts that arise naturally from following traditional districting principles in particular geographic areas and safe districts that arise because political insiders have grossly manipulated district designs for the purpose and effect of insulating preferred candidates from meaningful competition. The latter is not a permissible justification for exercise of the limited, enumerated power delegated to state legislatures on behalf of the people of the United States under the Elections Clause.

B. The Systematic Assignment Of Voters Into Overwhelmingly "Safe" Congressional Districts Threatens The Fundamental Voting Right Secured By Article I, § 2.

Article I, § 2, of the Constitution provides that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States * * *." The Constitution thereby expressly recognizes an af-

firmative right of the People to choose their representatives through properly structured congressional elections. This is the only textual reference to "the People" in the body of the original Constitution and the only express, original textual right of the People to direct, unmediated political participation in choosing officials of the national government.

Whatever issues may still cloud the justiciability of partisan vote dilution claims under the Equal Protection Clause, this Court has recognized for many decades its power to enforce strictly the guarantees to the People under Article 1, § 2. In *Wesberry* v. *Sanders*, 376 U.S. 1, 6-7 (1964), this Court rejected any justiciability claim "that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction * * *. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I."

The protections of Article I, § 2, specifically designed to guarantee the integrity of national elections, are greater than those under the general provisions of the Equal Protection Clause. This Court has so held with specific reference to the redistricting process. Compare *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969) (striking down under Article I, § 2, congressional districts with population deviations of as little as six percent) with *Mahan* v. *Howell*, 410 U.S. 315 (1973) (upholding under Equal Protection Clause challenge state legislative with population deviations up to 16.4%).

As this Court has recognized many times, Article I, § 2, makes unconstitutional state electoral practices that obstruct the right of the People to "fair and *effective* representation" and "an equally *effective* voice" in the selection of representatives, as identified by *Reynolds*, 377 U.S. at 565-66 (emphasis added). The importance of the voting rights of the People in congressional elections is highlighted by three cases whose significance for the Article I, § 2, implications

of non-competitive congressional districts has been underappreciated: *Powell*, *supra*; *Term Limits*, *supra*; and *Cook*, *supra*. Each overturned an effort to deny or improperly condition the ability of the People of a State to choose freely a congressional representative of their choice, either by congressional refusal to seat a disfavored representative (*Powell*), by state constitutional restriction on the ability to return a preferred candidate to office (*Term Limits*), or by imposition of conditions that compelled the attention of voters to predetermined issues (*Cook*). In each case, as expressed in *Term Limits*, this Court sought to "vindicate[] the same 'fundamental principle of our representative democracy' that we recognized in *Powell*, namely, that 'the people should choose whom they please to govern them.'" *Term Limits*, 514 U.S. at 819 (quoting *Powell*, 395 U.S. at 547 (internal quotation marks omitted)).

These cases recognize two principles with direct bearing on the unconstitutionality of grossly manipulated "safe" elections. First, the Court reiterated the importance of the sovereignty of the people in selecting freely their own representatives; as expressed by Justice Kennedy, "nothing in the Constitution or The Federalist Papers * * * supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives." *Term Limits*, 514 U.S. at 842 (concurring). Recalling the infamous Wilkes incident from Britain, in which Parliament attempted to usurp the power to decree proper representation, *Powell* turned to the "fundamental principle of our representative democracy," 395 U.S. at 547, "'that the people should choose whom they please to govern them.'" *Ibid.* (quoting 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed. 1876) (A. Hamilton, New York)).

Second, this Court identified a concern at the Founding that reposing the power to set the terms of congressional qualifications in the hands of incumbent officeholders would

be a direct threat to the constitutional guarantee of voter sovereignty:

> [In *Powell*,] we recognized the critical postulate that sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives to the National Government. For example, we noted that "Robert Livingston * * * endorsed this same fundamental principle: 'The people are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights.'" 395 U.S. at 541 n.76, quoting 2 Elliot's Debates 292-293.

Term Limits, 514 U.S. at 794-95 (omission in original).

Whatever the right of the political parties not to be discriminated against in districting, the central question before this Court *should* be whether the carving up of essentially uncontestable and uncompetitive spheres of influence is an impermissible effort, in purpose and effect, that threatens to "lead to a self-perpetuating body" as identified in *Term Limits*, 514 U.S. at 793 n.10. The constitutional principle that meaningful electoral accountability depends on the competitive integrity of congressional elections is not captured through the narrow framework of impermissible partisan advantage previously presented in *Bandemer* and *Vieth*.[11] Article I, § 2's specific grant of an affirmative right of the People to demand the accountability of their Representatives itself requires protection against artificially manipulated, noncompetitive elections. As expressed by Justice Kennedy, "freedom is most secure if the people themselves, not the

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[11] Nor is *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), to the contrary. *Gaffney*, like *Bandemer*, addressed Equal Protection limitations on state legislative redistricting for state legislatures. Neither case addressed the Article I limitations on state legislative power over congressional elections.

States as intermediaries, hold their federal legislators to account for the conduct of their office." *Cook*, 531 U.S. at 528 (concurring).

Yet as noted above, congressional elections in the wake of the post-2000 redistricting were the least competitive in American history. No matter which way the question is framed — incumbents defeated, incumbents retired, incumbents victorious in a landslide — the 2002 elections were less competitive than after any redistricting in any decade since *Baker* v. *Carr*. The following published Table provides the summary statistics:[12]

[12] Hirsch, *supra*, 2 ELECTION L.J. at 182.

Table 1. Comparison of the 2002 Election with Elections from 1972 to 2000

Category	Average "normal election" (1974–1980, 1984–1990, 1994–2000)	Average post-reapportionment election (1972, 1982, 1992)	2002 Election
Incumbents reelected	375	348	381
By > 20 points	297	261	338
By < 20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8[13]
Incumbent retirements	37	48	35
New members	60	87	54

As also noted earlier, the leading academic experts conclude that redistricting patterns were "a major reason" for the near elimination of competitive elections in 2002. See Jacobson, *supra*, 118 POL. SCI. Q. at 10-11. These results are even more troubling because the first election after the de-

[13] Challengers defeated only four incumbents in the 2002 election. An additional four incumbents lost seats due to diminution in the size of their States' congressional delegations. They challenged other incumbents and lost.

cennial Census, reapportionment, and redistricting is historically the time when congressional elections are *most* competitive. When not intentionally manipulated to eliminate competitive elections, redistricting is historically the moment at which incumbents and prior political coalitions are most destabilized and elections therefore most open to new blood. As the data presented above show, with new incumbents settling into their seats in new districts, congressional elections typically become less and less competitive over the ensuing decade.

The impact of self-interested, anti-competitive gerrymandering on electoral accountability is also demonstrated by marked differences between the competitiveness of Congressional districts in 2002 when courts or commissions designed districts compared to when partisan state legislatures did so.[14] In the 17 states using commissions or courts to draw congressional lines, 31% of the commission-drawn districts were competitive enough to preclude a landslide, 23.3% of the court-drawn districts were similarly competitive, but only 16% of the legislatively-drawn districts were competitive enough to be won by less than a landslide.[15] A decade earlier, the 1992 redistricting produced the same general pattern: commission-drawn districts were the most competitive, followed by court-drawn districts, with legislatively-drawn districts the least competitive. The major difference between 1992 and 2002 was a decline of almost 50% by 2002 in the number of congressional districts not won by a landslide when legislatures controlled districting. Thus, these data further confirm the perverse "perfection" in recent years of the

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[14] Data and analysis in this paragraph are from Jamie L. Carson & Michael H. Crespin, *The Effect of State Redistricting Methods on Electoral Competition in United States House of Representative Races*, 4 ST. POL. & POL'Y Q. 455-69 (Winter 2004).

[15] A race is defined here as competitive if the winning candidate received less than 60% of the two-party vote in the general election. *Id.* at 460.

political insider's "art" of undermining competitive congressional elections.

The cost of these "designer districts," artificially manipulated to ensure non-competitive elections, is not just the loss of electoral accountability that is the defining element of representative self-government. Competitive elections also are essential to other tangible democratic and constitutional values. Thus, it is well documented that competitive elections encourage the appearance of strong challengers to incumbents and increase voter turnout and party mobilization.[16] The two-party system itself is enhanced over the long run by competitive elections, for political parties that are overwhelmingly dominant in particular localities have no greater incentives than do lazy monopolists in economic markets.[17]

Finally, the structural role of the House is to be the institution most immediately and directly responsive to shifts in popular political preferences. Elections every two years and minimal qualifications for office were designed for exactly this reason. That is why mid-term congressional elections have historically served, as designed, as a partial referendum on national policy in the long interval between Senatorial and Presidential terms. State legislative abuse of the Elections Clause power interferes with this intended structural role of the House. As a result of anti-competitive districting, the

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[16] See STEVEN J. ROSENSTONE & JOHN M. HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 177-88 (1993); L. Sandy Maisel & Walter J. Stone, *Detriments of Candidate Emergence in U.S. House Elections: An Exploratory Study*, 22 LEG. ST. Q. 79 (1997); Gary C. Cox & Michael C. Munger, *Closeness, Expenditures, and Turnout in 1982 U.S. House Elections*, 83 AM. POLI. SCI. REV. 217 (1989); see also EVERETT C. LADD, WHERE HAVE ALL THE VOTERS GONE (1982) (identifying greater sense of efficacy among voters able to hold incumbents accountable).

[17] ALAN ROSENTHAL, THE DECLINE OF REPRESENTATIVE DEMOCRACY: PROCESS, PARTICIPATION, AND POWER IN STATE LEGISLATURES (1998).

House is now perhaps the *least* responsive institution in the national government:

> A national swing of five percent in voter opinion — a sea change in most elections — will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia that arrests the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion and thus frustrates change and creates undemocratic slippage between the people and their government.[18]

The Constitution prohibits state legislatures from undermining the House's essential structural role. Article I, § 2, works hand-in-hand with the Elections Clause. The Elections Clause does not grant state legislatures the power to manipulate congressional elections for impermissible reasons. This limitation on the grant of power is necessary to protect the affirmative right "of the People" in Article I, § 2, to choose their Representatives.

C. The Elimination Of Electoral Accountability Through The Willful Evisceration Of Competitive Elections Violates The Fundamental Purpose Of The First Amendment.

In addition to the Article I concerns already addressed, the intentional evisceration of competitive congressional elections violates the First Amendment. Widespread anti-competitive gerrymanders do grave violence to the profound relationship — both substantive and textual — that this Court has recognized between self-government and the First Amendment. See *McIntyre* v. *Ohio Elections Comm.*, 514 U.S. 334 (1995); *Williams* v. *Rhodes*, 393 U.S. 23, 41 (1968), (Harlan, J., concurring); see generally JOHN H. ELY, DEMOCRACY AND DISTRUST 77, 101-03 (1980).

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[18] Daniel R. Ortiz, *Got Theory?*, 153 U. PENN. L. REV. 459, 487 (2004).

The Framers organized the six textual clauses of the First Amendment in disciplined order. That order parallels the emergence of a democratic idea, moving from a citizen's conscience, to individual expression (speech), to mass expression (press), to political organization (assembly and association) and, finally, to interaction with elected officials (petition). Indeed, it is common ground that the First Amendment's core purpose is the protection of the free flow of information needed to permit genuine electoral choice. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002). When, as here, genuine electoral choice is systematically subordinated to partisan advantage, the damage to the First Amendment is unmistakable.

Moreover, the clauses themselves describe the essence of self-government. The quintessential act of political expression is the casting of a ballot. The quintessential act of political association occurs in the relationship between a voter and a favored candidate. The quintessential act of assembly is the rallying to the polls on Election Day. The election itself is the modern analogue of the petition for redress of grievances. When statewide political gerrymanders — either partisan as in this case, or bipartisan as in other settings — turn virtually every congressional election into a mere formality, the acts of voting, assembling, associating, and petitioning are reduced to hollow rituals. Under such circumstances, voters ratify political choices made for them by someone else, but do not exercise the generative political power that is the essence of representative self-government.

When an obvious political gerrymander, especially a mid-decennial exercise in partisan politics, systematically constructs islands of voters throughout a state in such a manner that competitive elections are virtually eliminated in every congressional district, the core element of self-governance — competitive elections — has been artificially destroyed. It matters not that the apportionment respects formal equality.

It matters not that the resulting political division of congressional representation is said, in some contexts, to be roughly equitable. What matters is that the state has treated voters, not as individuals, but as fungible political units whose democratic role is not self-governance, but the allocation of political spoils. See *Elrod* v. *Burns*, 427 U.S. 347 (1976) (government employees may not be viewed as political units designed to allocate the spoils of victory); *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996) (applying *Elrod* to independent contractors); cf. *Miller* v. *Johnson*, 515 U.S. 900 (1995).

II. Article I And The First Amendment Require A Per Se Rule Against Mid-Decade Redistricting, Absent Judicial Order Or Extraordinary Circumstance.

A. Mid-Decade Redistricting Requires A Per Se Rule.

Whatever the Court's response to the inevitable abuses at the decennial reapportionment stage, this Court should recognize that the Elections Clause does not grant state legislatures the power to engage in mid-decade re-redistricting, absent judicial decision requiring it or extraordinary circumstance (such as Hurricane Katrina and the accompanying massive population shifts). Such a bright-line, per se prohibition on mid-decade redistricting is required to enforce the limitations of the Elections Clause's grant of enumerated power and to reinforce the constitutional protection of electoral accountability and competitive elections. The risks that mid-decade districting will be used for purposes not within the scope of the Elections Clause, and the costs of mid-decade redistricting, are simply too substantial to tolerate.

The constitutional requirements of the decennial census and congressional reapportionment, U.S. CONST. art. I, § 2, cl. 3, combined with the constitutional requirement of one person, one vote, require the states once a decade to exercise their Article I powers. When this power lies in the hands of

partisan, self-interested incumbents (as in most states), it is predictable and inevitable that those insiders will seek to insulate their allies from electoral accountability, to pursue partisan advantage, or both.

The misuse of these Article I powers artificially to eliminate electoral accountability and create non-competitive districts, as noted above, is unconstitutional in any context. But whatever the Court's response to abuses during the decennial redistricting process, the risk that mid-decade redistricting will be used to abuse the Elections Clause power mandates a discrete rule dealing with mid-decade redistricting. A bright-line, per se prohibition will forestall the risk of a spiral of retaliatory mid-decade re-redistrictings, as the political fortunes of the two parties ebb and flow throughout the decade across different states or as incumbents find themselves at electoral risk.

No constitutional compulsion — indeed, no legal compulsion of any sort — exists for state legislatures to engage in redistricting during the decade as partisan political prospects wax and wane in particular states. Indeed, nothing in our historical experience compels this extraordinary assumption of power by the state legislatures. In the 20th century, there had been no practice of mid-decade congressional redistricting of which we are aware before mid-decade redistricting efforts suddenly erupted this decade. Rather, the emergence of this practice results from a combination of (1) closely balanced partisan control of the House and (2) technological breakthroughs in election data bases and computer technology that enable "perfecting" the self-interested creation of overwhelmingly safe districts. The partisan margin of power in the House has hung in the balance for a more sustained period than at any time over the past 100 years;[19] when partisan control was last divided as closely, numerous state legislative

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[19] See *2002 Election Statistics, supra.*

schemes sprung up to manipulate congressional elections.[20] National legislation and constitutional law now prohibit most of the offending historical practices, such as legislative manipulations of suffrage rules and vote fraud. But given the allure of political power, efforts to invent new practices not yet prohibited — such as mid-decade redistricting — will inevitably arise again when partisan control of the House is at stake.

We do not defend the constitutionality, the fairness, or the appropriateness of the prior legislative plans that preceded the recent mid-decade redistrictings in Texas, Colorado, and Georgia. But a per se rule against mid-decade congressional redistricting, not required by judicial decision or extraordinary circumstance, is the most appropriate judicial means to implement the guarantees and limitations of Article I and the First Amendment. The risk that such a power will be used for constitutionally impermissible purposes is obvious; the benefits of such power for legitimate purposes are undemonstrated, given the absence of a historical state practice of mid-decade redistricting; and, even assuming mid-decade redistricting might conceivably be used in some context for permissible purposes, the courts will find it difficult on a case-by-case basis to distinguish mid-decade redistricting that reflects constitutionally permissible versus impermissible purposes. To judge whether a prior plan was "fair," or whether the new, mid-decade plan uses the purported unfairness of the prior plan to justify a new plan that is also "unfair," requires the Court to re-visit the inquiries that divided it in *Vieth*. To judge the sole, dominant, or partial purpose of a particular mid-decade redistricting similarly re-

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[20] Thus, in the late 19th century, when partisan control of the House similarly hung in the balance over many years, practices of vote fraud, intimidation, manipulation of suffrage rules, and extraordinarily gerrymandered election districts, proliferated. See J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, in CONTROVERSIES IN MINORITY VOTING 135, 141-52 (B. Grofman & C. Davidson eds., 1992).

quires difficult judicial determinations — and only invites political actors to disguise their purposes better next time around.

This Court should not get mired in those inquiries. A bright-line rule that the Elections Clause does not permit mid-decade redistricting is the most appropriate means to enforce the Elections Clause's enumerated grant of limited power to state legislatures. See *Crawford* v. *Washington*, 541 U.S. 36, 67 (2004) (holding that constitutional guarantees of proper legal process must be protected through bright-line, categorical rules to withstand inevitable pressures to distort in controversial cases).

A per se prohibition also reinforces the right incentives for political actors who control districting. If districting is endlessly open to revision, those actors likely to lose at the start of a new districting cycle have an incentive to paralyze the process, to game the outcome that might be reached, perhaps through a court-drawn plan, and then to revisit the plan if they dislike it and gain more legislative power over the decade. A per se rule makes clear that political actors must negotiate and compromise at the start of the decade, at the risk otherwise of losing control of the outcome. A per se rule also indirectly constrains partisan gerrymandering. Justice O'Connor suggested in *Bandemer*, 478 U.S. at 152 (concurring), that "political gerrymandering is a self-limiting exercise." To that extent that remains so in the age of computer technology, it is because political actors must bind themselves to a redistricting plan at the start of the decade and live with the consequences until the next Census. Mid-decade redistricting destroys that inherent, structural check. See *Salazar* v. *Davidson*, 79 P.3d 1221 (Colo. 2003) (holding mid-decade congressional redistricting designed to protect vulnerable incumbents unconstitutional under state constitution), *cert. denied*, 541 U.S. 1093 (2004).

Moreover, were mid-decade redistricting to be permitted, the political parties would inevitably engage in retaliatory re-

redistricting — particularly when partisan control of the House is closely divided. In the dormant commerce clause context, this Court recognized long ago that the appropriate means to address discriminatory state commercial laws was not for states to enact retaliatory discriminatory laws of their own; instead, this Court declares such laws unconstitutional, lest a downward spiral of retaliation, in which national prosperity is drained, ensue. See *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 390 (1994) (condemning "local economic protectionism, laws that would excite those jealousies and retaliatory measures that the Constitution was designed to prevent. See THE FEDERALIST NO. 22 143-145 (C. Rossiter ed. 1961) (A. Hamilton); James Madison, *Vices of the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON 362-363 (G. Hunt ed. 1901)."). The Court should instead stop this cycle in its inception by recognizing that the Constitution does not authorize states to engage in mid-decade redistricting, at least absent judicial compulsion or extraordinary circumstance.

B. Judicial Standards Are Available For Future Decennial Redistricting.

For contexts outside that of mid-decade redistricting, including more routine, decennial redistricting, the specific standards courts can employ to respond to the attempts of state legislatures to eliminate or diminish electoral accountability and competition, cannot adequately be addressed here. Suffice it to say, a principal tool for legislative self-dealing in this context is running roughshod over traditional districting principles: the freewheeling parceling out of pieces of towns, cities, and counties into a number of different districts; the cavalier disregard of any obligation to keep districts reasonably compact; the use of wholly artificial means to purportedly keep districts "contiguous," in only the most nominal sense; and the use of increasingly refined partisan electoral data in the districting process. See, *e.g.*, *Karcher* v. *Daggett*, 462 U.S. 725, 744 (1983) (Stevens, J., concurring); *Shaw* v.

Reno, 509 U.S. 630 (1993). In earlier decades, respect for these principles imposed tacit constraints on the extent to which self-interested redistricters could manipulate district design to insulate preferred incumbents and candidates from political competition and electoral accountability. As with other tacit constraints, once these informal, generally accepted limitations on unmediated pursuit of political self-interest begin to break down, a race to the bottom quickly ensures the virtual elimination of these traditional constraints altogether. Mid-decade redistricting is but one example of the recent erosion of such long-understood constraints.

It is essential to recognize that judicial standards in this area need not take the form of bright-line rules, with necessary and sufficient doctrinal criteria of application fully specified in algorithmic-like form. Just as in other areas involving the Constitution's central structural commitments, certain aspects of gerrymandering's constitutional threat might lend themselves to bright-line judicial doctrine; others will not. In enforcing federalism and limits on enumerated national powers, for example, this Court has been able to craft bright-line rules in certain contexts. See, *e.g.*, *Printz* v. *United States*, 521 U.S. 898 (1997) (anti-commandeering rule). But for other contexts, this Court has candidly acknowledged that even the best formulated doctrine will inevitably leave "legal uncertainty" concerning the doctrine's boundaries. *Lopez*, 514 U.S. at 565; *see also id.* at 579 (Kennedy, J., concurring) ("[A]s the branch whose distinctive duty it is to declare 'what the law is,' *Marbury v. Madison* [citation omitted], we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines."). Nonetheless, as the Court concluded in *Lopez*, "[a]ny possible benefit from eliminating this 'legal uncertainty'" — either through abandoning judicial enforcement or overly rigid judicial doctrine — "would be at the expense of the Constitution's system of enumerated powers." *Id.* at 566. See also *Boerne*, 521 U.S.

at 520 (employing "congruence" and "proportionality" standard).

Similarly, in enforcing the separation of powers, this Court has sometimes recognized violations that lend themselves to bright-line boundaries. See, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986) (invalidating an "active role for Congress in the supervision of officers charged with the execution of the laws it enacts"). But for some of the most momentous issues, the Court has acknowledged that maintaining the proper constitutional balance between diffusing and integrating governmental power cannot be judicially enforced through highly determinate legal doctrine. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."). The structural foundations of the constitutional order, including the commitment to self-government through the electoral accountability of representatives, are too essential to be judicially unenforceable, but too complex always to yield to bright-line judicial doctrine. "The great ordinances of the Constitution do not establish and divide fields of black and white." *Springer* v. *Gov't of Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

Judicial standards for enforcing the limits on the power delegated to state legislatures in the Elections Clause, and for enforcing the right of "the People" under Article I, § 2, and the First Amendment to hold their representatives electorally accountable, should be evaluated in this context, not against abstract ideals of doctrinal perfection neither available nor applied in enforcing the Constitution's other fundamental structural commitments.

CONCLUSION

Three structural ideas permeate the Constitution: separation of powers, federalism, and representative self-government. One of the institutional triumphs of this Court has been the forging of constitutional doctrine preserving separation of powers[21] and federalism[22] in settings where leaving these commitments to the political branches cannot protect the relevant structural values. While the contested nature of separation of powers and federalism occasionally involve the Court in controversy, the Court has recognized that judicially-enforced constitutional law must provide a keystone for two of the Constitution's three great structural arches.

The third structural arch and arguably the most important — representative self-government through periodic competitive elections, in which voters are able to hold their representatives accountable — similarly cannot be left to the political process itself. Mid-decade redistricting, absent judicial order or extraordinary circumstance, should be unconstitutional. Judicial standards should also be developed to limit state legislative abuse of the Elections Clause power in the more regular decennial redistricting context.

For all these reasons, the decision below should be reversed.

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[21] See, *e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Clinton* v. *City of New York*, 524 U.S. 417 (1998); *Bowsher*, *supra*; *INS* v. *Chadha*, 462 U.S. 919 (1983); *Youngstown Sheet & Tube Co.*, *supra*; *United States* v. *Nixon*, 418 U.S. 683 (1974).

[22] For "vertical federalism," see, *e.g.*, *Morrison*, *supra*; *Lopez*, *supra*; *NLRB* v. *Jones & Laughlin Steel Corp.*, 310 U.S. 1 (1937); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824). For "horizontal federalism," see, *e.g.*, *C & A Carbone, Inc.*, *supra*; *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994); *Metro. Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

Respectfully submitted.

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Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICUS CURIAE* SENATOR ROBERT C. JUBELIRER IN SUPPORT OF APPELLEES

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Appellants,

v.

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GI FORUM OF TEXAS, *et al.*,

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INTEREST OF *AMICUS CURIAE*

Robert C. Jubelirer, in his capacity as President *pro tempore* of the Senate of the Commonwealth of Pennsylvania, submits this brief as *amicus curiae*.* He was a party in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Senator Jubelirer has also participated as *amicus* in an earlier redistricting case, *Branch v. Smith*, 538 U.S. 254 (2003) and in a case involving whether a federal statute created a private right of action against a state, *Alexander v. Sandoval*, 532 U.S. 275 (2001). He is a constitutional officer of Pennsylvania's legislative branch of government, which has responsibilities for both congressional redistricting and its own redistricting.

SUMMARY OF ARGUMENT

Congressional redistricting is inherently political, having partisan effects no matter how it is approached. There are no neutral judicial standards for ascertaining how much partisan effect in redistricting is too much, nor are there neutral standards for a court to use in drawing its own redistricting map. A legislature can reasonably determine that a districting plan has become so incompatible with changes in the political preferences of the electorate that an intra-decennial redistricting is warranted. The courts should defer to the most recent political judgment of the legislature in order to avoid making

* No counsel for a party authored this brief in whole or in part, and no person or entity other than the office of the *amicus* made a monetary contribution to the preparation of this brief. Letters of consent from counsel for the parties are on file with the Clerk.

political judgments of their own. Partisan redistricting per se does not impair the rights of any individual voter or any cognizable group. There are no constitutional restrictions on intra-decennial redistricting.

ARGUMENT

I. THIS CASE IS NO DIFFERENT THAN *VIETH V. JUBELIRER* IN THAT JUDICIALLY MANAGEABLE STANDARDS ARE LACKING FOR ADDRESSING THE INHERENT PARTISAN IMPACT OF REDISTRICTING

In *Vieth v. Jubelirer,* 541 U.S. 267 (2004), a majority of the Court took the view that judicially manageable standards for addressing partisan impact in redistricting plans had not been discovered. Moreover, every member of the Court recognized that partisan impacts are inherent in the fundamentally political process of configuring districts for legislative representation. *Id.* The Court has always been chary of invading the province of the political branches in this task. *See White v. Weiser*, 412 U.S. 783, 795-96 (1973) ("Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task.").

Appellants argue that this matter is different than any previous redistricting case, that standards are at hand and that, for the first time, the Court should strike down a state law on the grounds that it embodies an unconstitutional quotient of partisan gerrymandering.

In advancing this contention, the Appellant Democrats' Brief[1] confuses three distinct concepts that relate to the legislative enactment of the Texas plan: the effect of the law, the purpose of the law and the motives of some or all of the lawmakers. *See* Democrats' Brief, p.17. Arguing that gaining partisan advantage was the sole motive for the plan, the Democrats contend that this case "does not ask a Court to determine how much bias is too much" because "a redistricting plan undertaken solely to achieve partisan advantage, and serving no other purpose, necessarily violates the Constitution." *Id.* Unscrambling the concepts conflated in this statement shows the error of the contention.

Legislative Purpose

A valid purpose of the Texas law can be determined by using principles of statutory construction commonly employed in equal-protection cases. In examining a statute that does not adversely affect a fundamental right or make a classification based upon a suspect criterion, the courts look for a legislative purpose that constitutes a rational basis for the statute. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 195-96 (1983). If any possible rational basis can be inferred for the statute, the courts will uphold it. *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 809 (1969) ("Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will

[1] References to the "Democrats' Brief" or "the Democrats" are to the Brief for Appellants, the "Democratic Congressional Intervenors" and the "Jackson Plaintiffs" in No. 05-276 and to those parties respectively.

be set aside only if no grounds can be conceived to justify them.").

Applied here, it is apparent that one possible purpose of the Texas plan was "to *undo* a perceived *dis*advantage imposed previously," i.e., by the 1991 Democratic gerrymander that was perpetuated by the District Court's 2001 plan. *See* Memorandum Opinion of District Court, incorporated at J.A. 11 (Tab 266), at 14 and 22 (emphasis in original). Viewing the incongruity between the 2002 Republican sweep of statewide offices and the Democrat retention of a majority of congressional seats,[2] the Texas legislature could reasonably have perceived a need for legislation to reconfigure the communities of political interest in congressional districts to make them more reflective of present-day Texas.[3] Since grouping people for

[2] *See* Barone and Cohen, *The Almanac of Am. Politics*, 2004 and 2006 editions (Nat'l Journal Group, Wash., D.C.) The *Almanac* is a useful compilation of statistics as well as a font of political gossip. It is cited here only for the former. Texas Republicans now hold all 29 statewide elective offices and have majorities in both houses of the legislature. Yet, in 2002, under the District Court's redistricting plan, Democrats won 17 out of 32 congressional seats.

[3] The District Court should not be blamed for producing a plan that was out of sync with the inclinations of Texas voters. Its mission was to produce a one-person-one-vote plan that caused minimal violence to past legislative judgments about representation. The District Court simply couldn't replicate the legislative process. The District Court necessarily received its input in public. It could have no private discussions with constituents, local officials or members of Congress to find out what they really wanted. The candid preferences and, perhaps more importantly, dislikes and local rivalries, of constituents are apt to elude a court, which will hear only the sanitized views of those witnesses who choose to speak in a public forum. Legislators, though, may actively seek out constituent comment rather than wait for counsel to present a witness list. Expert witnesses have inordinate influence on courts, whereas legislators rely on their intimate knowledge of constituencies despite what the experts say. Most importantly,

(Continued on following page)

political representation is the essence of having districts, the Texas legislature's possible perception of a need to regroup to reflect changes in the politics of its citizens would be a rational basis for the statute.

Even casting the legislative purpose in terms of a purely partisan objective does not lead to a different conclusion. This Court has *relied* on partisan gerrymandering as a basis to uphold a redistricting plan. *See Easley v. Cromartie,* 532 U.S. 234 (2001) (partisan gerrymander is a valid purpose, defeating claim of racial gerrymander).[4] The Court there equated "the creation of a safe Democratic seat" with "a constitutional political objective." *Id.* at 239. Accordingly, far from violating the Constitution, even a partisan gerrymander that "serves no other purpose" has a valid purpose.

A legislative purpose to enact a partisan gerrymander is essentially no different than a purpose to protect incumbents. Incumbent protection is often achieved through a "bipartisan gerrymander." A redistricting plan that protects incumbents has essentially the same effect (or the same non-effect, as argued below) on the rights of individual voters in a district as a partisan gerrymander. Yet, the

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legislators may initiate policy changes, discarding even their own precedent.

[4] The Democrats' Brief does not cite *Easley.* The result they seek here cannot be reconciled with *Easley.* The Court described the effect of the redistricting plan in that case as follows: "A legislature trying to secure a safe Democratic seat is interested in Democratic voting behavior. Hence, a legislature may, by placing reliable Democratic precincts within a district without regard to race, end up with a district containing more heavily African-American precincts, but the reasons would be political rather than racial." *Easley,* 532 U.S. at 245. The Court in *Easley* upheld precisely the partisan effect contested here.

Court has recognized "incumbent protection" as a valid objective of redistricting. *Bush v. Vera*, 517 U.S. 952, 964 (1996) (with respect to redistricting, "we have recognized incumbency protection . . . as a legitimate state goal") (citations omitted); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

Legislators' Motives

The motives of some or all of the legislators who voted for a law are distinct from the law's purpose. Motives are not a valid area of inquiry in statutory analysis. *See Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) ("The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned."); *see also McCreary County, Kentucky v. ACLU*, 125 S.Ct. 2722, 2734 (2005) (legislative purpose must "emerge[] from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts"). Legislative history of a law excludes evidence of the personal motives of the individuals who comprise the state entity that made the pronouncement. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975) ("Our cases make clear that in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."). Any other rule would allow courts to pick and choose from statements or conduct of individual members of a legislative body, in order to ascribe a motive to all members. To avoid this skewing of motives by individuals, a court would have to induce each member of the body to waive Speech or Debate immunity (when a federal law is at issue) or its common law equivalent (for state legislators) and to

appear in court to testify about motive.[5] The court would in effect have to take a roll-call vote to determine the majority motive, if any, for the law. Besides being infeasible, such a courtroom poll might not even resemble the reality at the time of enactment. Therefore, the Court has wisely excluded legislators' motives from the test for legislative purpose. *A fortiori* a court should not impute the motives of non-members who lobbied for a law to the legislature itself.[6] However, even if the motives of some legislators in this case are conflated with the purpose of the law, the purpose remains a valid one. *See Easley*.

Legislation's Effect

The partisan bias in the plan is part of the *effect* of the statute. Partisan bias in a districting plan has been variously defined. To some, it is the degree to which the votes for a party's candidate in a district vary from the statewide voting strength of the party, measured by selecting various statewide races. *See, e.g.*, J.A. at 34-36 (report of Professor Alford). To others, it is the difference in how parties would fare in winning seats, if hypothetically given the same percentage of votes. Brief of *Amici* King *et al.* at 3. There may be other views, but, in any event, partisan bias is a concept distinct from legislative purpose or legislators' motives.

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[5] *Bogan v. Scott-Harris*, 523 U.S. 44 (1998) (unanimously reaffirming the existence of common law legislative immunity and clarifying its applicability to local legislators).

[6] For purposes of Texas's congressional redistricting, even Rep. Tom DeLay was not a legislator. He was as free as any citizen to petition the legislature of his state for action.

Having distinguished the effect from the purpose and/or motives for the law, the Court's task, if anything, is to weigh the law's effect, not to try to quantify its purpose or the motives of the legislators who, as a body, enacted it. The Court is therefore faced in this case with the same questions as in *Vieth v. Jubelirer*: How much partisan effect is too much? How is it to be measured? The answers are the same as in *Vieth*: there are no neutral, objective standards that a court can apply.

II. THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS FOR ASSESSING PARTISAN GERRYMANDERING

Various tests have been proposed for judicial resolution of political gerrymandering claims. All these tests have inherent partisan impacts. As the *Vieth* plurality explained, not one is either neutral or judicially manageable. *See Vieth*, plurality opinion at III.A. *Amicus curiae* respectfully offers the following additional analysis of potential tests.

In *Vieth*, Justice Stevens suggested that courts should test for impermissible partisan gerrymandering using the same standard that is employed in racial gerrymandering cases. *Vieth*, 541 U.S. at 339. That is, that courts should apply strict scrutiny if a state legislature has engaged in congressional redistricting with a predominant partisan purpose, "forsaking all neutral principles." *Id.*

The first problem with this test is that it would apply strict scrutiny to purpose rather than, as in other cases, to

effect.[7] When thus refocused, the test is somewhat tautological because to qualify for the test is to fail the test. A statute the predominant purpose of which is invalid would instantaneously fail the test, because the state necessarily could not articulate a compelling state interest, which is found in the legislative purpose. A second problem is in the labeling of the purpose. A valid purpose of redistricting is to restructure communities of political interest to better reflect changing politics. Yet, because in any such case the result will have partisan impact, a court could label the purpose as predominantly partisan. In construing a statute, though, a court has a duty to recognize any plausible valid purpose. *McDonald*, 394 U.S. at 809 ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent."); *McGowan v. State of Maryland*, 366 U.S. 420, 425-26 (1961). Characterizing the purpose of a statute in the worst possible terms is not the function of the courts. Characterizing the purpose in the best possible terms is the duty of a court, which must uphold the statute if at all possible. A third problem with the test is that it hypothesizes the existence of "neutral principles." There are none. For example, protecting incumbents is considered a valid principle for districting. Yet, incumbent protection has

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[7] Strict scrutiny looks at statutory effect on a fundamental right, then looks at the purpose to see whether the statute is narrowly tailored to advance a compelling state interest. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). Strict scrutiny is not itself a standard. It merely shifts the burdens. Strict scrutiny is unwarranted in partisan redistricting claims. *See Vieth*, plurality opinion. There is another key distinction between racial and partisan gerrymandering claims. The former focus on the district level, where evidence of them is largely found. The latter relate to overall state plans. *See* J.A. at 34 (report of Professor Alford).

partisan impacts and is really just a species of partisan gerrymander. Respecting municipal boundaries has likewise been considered a neutral principle, yet 19th century city and county lines have been ignored by the spread of residential and commercial development since World War II. Urban municipal boundaries, moreover, can be used to "pack" Democrats and minorities into districts to achieve partisan goals. Highway and public sewer corridors are arguably more relevant to defining communities of political interest, but attempting to use them also produces partisan effects, as well as "ugly" districts.[8] Ultimately, it must be acknowledged that the very concept of districting has implicit partisan aspects.

Justice Souter remarked in *Vieth* that courts should reach the conclusion that impermissible partisan gerrymandering has occurred when a plaintiff demonstrates: (1) that he is a member of a "cohesive political group"; (2) "that the [congressional] district of his residence . . . paid little or no heed" to traditional redistricting principles; (3) that there were "specific correlations between the district's deviations from traditional [re]districting principles and the distribution of the population of his group"; (4) that a hypothetical congressional district, which includes the plaintiff's residence, could remedy the packing or cracking of the plaintiff's group and deviates less from traditional redistricting principles; and (5) that "the defendants acted intentionally to manipulate the shape of the district [in question] in order to pack or crack his group." *Vieth*, 541 U.S. at 347-50. This test was addressed by the *Vieth* plurality. *Id.* at 296.

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[8] Because patterns of population growth have not conformed to anyone's idea of neatness or beauty, the courts should not use aesthetic criteria for evaluating the shapes of districts.

In addition, *amicus curiae* respectfully submits that members of "cohesive political groups" are impossible to identify on a state-wide, partisan basis. Unlike members of racial groups, whose identity is unchangeable, the political identity of a voter is changeable from election to election and candidate to candidate. Voter registration does not identify "cohesive political groups," because voters often cross party lines in the same election to vote for candidates of different parties. In Pennsylvania, for example, where Democrats have had about half a million more registered voters than Republicans, voters split tickets in 2000 and 2004, electing candidates of both parties in statewide races.[9] In 2000 and again in 2004, Pennsylvania voters picked a Democrat for president and a Republican for senator. One cannot call these shifting majorities a "cohesive political group." Even single-issue voters cross party lines: Pennsylvania has pro-choice Republicans as well as pro-life Democrats and vice-versa. Moreover, voters enjoy the protection of the secret ballot, so that even party workers may secretly split their tickets. Although Texas looks quite Republican at present, one cannot assume that Texas voters behave any differently. The right combination of issues and candidates could produce abrupt change.

Moreover, "traditional districting principles" should not become a constitutional standard when no basis for such exaltation exists. They may seem attractive, because courts are familiar with them, but such a freezing of past practices into constitutional doctrine would deprive legislatures of their distinctive function: the ability to

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[9] *See Almanac*, 2004 and 2006 editions.

envision the future and change the way things are done. The Court should not promote old practices that themselves have partisan effects, but that the Court is willing to condone.

Justice Breyer said that impermissible partisan gerrymandering involves "the *unjustified* use of political factors to entrench a minority in power." *Id.* at 360. In explaining his standard, Justice Breyer commented:

> By entrenchment I mean a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power. By *unjustified* I mean that the minority's hold on power is purely the result of partisan manipulation and not other factors. These "other" factors that could lead to "justified" (albeit temporary) minority entrenchment include sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.

Id. The *Vieth* plurality addressed this standard. *Id.* at 299. *Amicus curiae* respectfully submits, in addition, that defining when a party "holding power" is one "that enjoys only minority support" requires multiple exercises of subjective political judgment. To be "holding power," how many offices must a party hold and for how many election cycles? How does one determine whether a party enjoys only minority support? Does one look only to the most recent elections or does one give weight to the choices of voters of the past? A party whose support is waxing will want a court to weigh its present support. A party whose support is waning will contend that it is still a majority

party and want to include less recent elections in the scales.[10] Moreover, the court would have to adjust for significant factors that affected each election, such as the effects of incumbency, campaign spending, the relative quality of competing candidates, hot issues and even variances in weather across the state on election day. Whatever answers a court gives to these questions will have partisan impacts on the court's final assessment.

Amici King, *et al.* contend that there is a judicially manageable standard that is based on their concept of partisan symmetry. They advocate having the courts use computer programs to "examine all relevant election-related data" to calculate the difference in seats that two parties would win at a given vote level. Brief of *Amici* King, *et al.* at 9. However, as they acknowledge, there are different approaches and "inputs may vary." *Id.* at 10. Some of the variables include the presence of incumbents, whether races are contested, party registration, prior party control of the district, "candidate quality" and demographics. *Id.* Scandals and campaign spending, together with "relative campaign effectiveness and the like" are also issues.[11] How one weighs these factors is a subjective exercise. How strong is an incumbent? How poorly did a candidate handle debates? Can you reduce these subjective factors to numerical values? Ultimately, this approach requires a court to pick which expert it

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[10] If one does not dilute the present preferences of Texas voters by weighing the votes of the past, it would appear that the Democratic Party in Texas enjoys only minority support.

[11] Gelman and King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, Am. Journal of Political Sci., Vol. 38, No. 2, May 1994, at 544.

prefers. The expert's choices then become the court's choices. This approach would simply try to mask the political judgments that a court would be making, using experts and black boxes.

III. THE PARTISAN IMPACTS OF REDISTRICTING DO NOT AFFECT INDIVIDUAL RIGHTS

None of the appellants have shown that any of their rights have been impaired by the partisan impacts of redistricting. The Texas plan conforms to the one-person-one-vote requirement. Each voter has the right to cast a secret ballot. Each voter even has the right to write in a candidate on the ballot, if the candidates listed are not acceptable.[12] Like voters everywhere, voters in Texas can, and do, split their tickets.[13] Nobody has a right to have the candidate of their choice win. No candidate has a right to win election to public office.

Any candidate elected to Congress will generally tend to represent the overall interests of the constituency of the district.[14] This is why a Democrat elected in a conservative

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[12] TEX. ELEC. CODE ANN. § 146.001.

[13] *See* JACOBSON, THE POLITICS OF CONG. ELECTIONS (Addison-Wesley Educ. 5th ed. 2001) at 108 (noting a growing proportion of voters in congressional races "who vote contrary to their expressed party affiliation").

[14] Under the "median voter" theory, elected officials gravitate towards the position of the voter at the hypothetical equilibrium point of politics in the district. *See* Congleton, *The Median Voter Model*, Ctr. for Study of Pub. Choice, George Mason Univ. (2002) (visited on Jan. 29, 2006 *at* http://www.rdc1.net/forthcoming/medianvt.pdf). For a more complex model that incorporates both constituent interests and institutional concerns, *see, e.g.*, Lopez, *The Legislator as Political Entrepreneur: Investment in Political Capital*, The Review of Austrian Econ. (2002), 15:23, 211-228.

district migrates at least somewhat to the right of the party and a Republican in a liberal district moves at least somewhat to the left of the party. Regardless of party, the member tries to bring value to the district in constituent services, economic development and public projects.

The Court has been presented with the spectre of computers determining outcomes of elections, by the grouping of voters. However, no individual voter is an automaton in a computer-manipulated matrix. Each voter makes choices, candidate by candidate and office by office. Computers are simply sifting data to describe what real live people are doing at the ballot boxes. The computers are not directing their actions. This undeniable truth exposes the sham of concern about the impact of gerrymandering on individual voters.

A good candidate who has the feel of a district can defeat a bad candidate despite the best computerized cartography. In Pennsylvania, for example, an incumbent Republican was defeated in 2002, despite running in a heavily "Republican" district.[15]

The power of incumbency is nevertheless a major factor in holding down the turnover in congressional seats.[16] Voters get to know, and often to like, incumbents

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[15] *See Almanac*, 2006, p. 1465. The Democrat who won the 17th District in 2002 was reelected in 2004 by a bigger margin.

[16] While retention of incumbents is high, many factors other than gerrymandering contribute to it: "The list of possible causes for the growth of the incumbency advantage is quite long [and] includes the rise of candidate-centered politics, the increased use of the perquisites of office (such as porkbarreling, the franking privilege, credit claiming and casework), and rising campaign costs that inhibit effective challengers." Persily, *In Defense of Foxes Guarding Henhouses: The Case for*

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and usually choose to retain them. That they do so with high frequency does not mean that they are "controlled" or deprived of the right to choose. They are free to choose incumbency over other options.

The partisan effects of congressional redistricting, therefore, do not affect the rights of individual voters. Why then has redistricting engendered so much litigation?

The answer is that the fight, battled state by state, is really about the organizational control of the House of Representatives. This control matters to the parties and the members of the House. It determines the Speakership and committee chairs and affects many perquisites of office. But, it is not a judicially cognizable interest of the individual voter. The individual plaintiffs are, in actuality, merely proxies for the real combatants, the political parties.

In suits over alleged partisan gerrymandering, plaintiffs invoke the formula that they are "unable to elect the candidate of their choice." As demonstrated, when it comes to partisan redistricting, this is an empty, conclusory allegation and not one that shows the substance of any real harm.

IV. UPHOLDING THE TEXAS PLAN IS THE ONLY OUTCOME THAT EMBODIES JUDICIAL DEFERENCE TO LEGISLATIVE POLICY

To find for a partisan gerrymandering claim a court would be forced to make forbidden policy determinations

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Judicial Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 666 (2002).

"about how this Nation is to be governed." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring). In contrast, in one-person, one-vote cases, the courts accept and incorporate the basic legislative choices previously made.

This distinction between the two types of cases becomes clear in contemplating relief. Every one-person, one-vote case to date has been resolved either by a legislature enacting a new districting plan or, if the legislature is deadlocked, by a court drawing a new map. In the latter instance, when the court draws a map to achieve population equality, the court must deviate as little as possible from the previously enacted map, thus preserving the policy choices inherent in the map. *See White*, 412 U.S. at 795-97. But, if the courts task themselves with exorcising partisanship from mapmaking, they would not be able to use previous legislative enactments as the historical base for map-drawing because those plans are themselves infected with politics. Even if the judiciary tried to retain some "good" political choices by the legislature while discarding other "bad" partisan choices inherent in a previous enactment, the judiciary would still be making political choices and would find both its decisions and its decision-makers being critiqued for partisan bias.

The Court faces this problem here. It has three basic options in this case. First, if the Court affirms, elections will be held again under the Texas statute's map. Second, if the Court reverses, finding the statute unconstitutional, elections will occur under the plan adopted by the District Court in 2001, which substantially perpetuated the Democrat gerrymander of the '90s. This plan would be used until superseded. Third, the Court could conceivably find fault with both plans and order the District Court to allow

the Texas legislature an opportunity to create a new plan, using whatever criteria the Court adopts. If the legislature failed to do so, the District Court would have to draw a map, using the Court's criteria. All these choices have partisan, political effects, but only one is a proper course for the judiciary.

The current map embodies the most recent policy decisions of the legislature about how communities of political interest should be represented. Although the map, like any plan, has partisan impact, by upholding it the Court would be deferring to legislative policy on political issues. *Id.*

The second option, involving a reversion to the District Court's map, also embodies political choices of the legislature, in so far as it is based on the earlier statute. In that respect, it is no different than the present map. But the District Court's map reflects the legislative policy of more than a decade ago. When a later legislature passes a statute that is inconsistent with an earlier, unrepealed statute, the courts do not choose which they prefer. The courts give effect to the later enactment, deferring to the most recent policy of the legislative branch, rather than making a policy choice themselves. *See Posadas v. Nat'l City Bank of New York*, 296 U.S. 497, 503 (1936). Implicit in this deference is a recognition that new legislatures are elected so that they can adapt policy to fit changing times and evolving constituencies. So, too, in redistricting, the courts should always defer to the legislative determination that was made closest to the present time. Otherwise, the courts would be expressing a preference for past policy, yet applying it to present circumstances.

The third choice, perhaps unlikely but possible, would represent a political decision by the Court to discard all prior legislative policy choices and to start over with a blank paper and new tools. This, however, would require the Court not just to reject legislative guidance, but also to make subjective choices about how to measure partisan bias and how much bias is an acceptable amount. To be fair, the standards would have to apply consistently, both to legislative and judicial mapmaking. The Court could not in good conscience use one standard to overturn the current statute, yet fail to apply it to the District Court's plan or to the drafting of a new plan. For example, the Court should not use conformity to traditional municipal boundaries as a standard of review for a legislative map, then waive the standard for a court to draw a map (because the standard tends to compact minorities and Democrats into cities). In any event, because there are no neutral standards either for measuring bias or for avoiding it in mapmaking, the third option would put the judiciary on the political spot.

The Court's decision in this case will obviously have partisan political impact regardless of which option it chooses. However, only the first option, affirmance, allows the judiciary to avoid making policy choices about current politics and communities of political interest by deferring to the political branch of state government.

V. INTRA-DECENNIAL REDISTRICTING IS WITHIN THE DISCRETION OF THE LEGISLATURE

Article I, Section 4 of the United States Constitution provides that the "time, places and manner of holding Elections for Senators and Representatives shall be

prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such regulations[.]" U.S. CONST. art. I, § 4 (emphasis added). "[T]hese comprehensive words embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932); *United States v. Classic*, 313 U.S. 299, 311 (1941) ("states are given, and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in Congress").[17] *See also Wesberry v. Sanders*, 376 U.S. 1, 33 (1964) (Harlan, J., dissenting) ("the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, including the power to district well or badly, subject only to the supervisory power of Congress").[18]

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[17] Appellee Henderson argues that various limits in early state constitutions should be imputed to exist in the federal Constitution as some form of limitation on the power of the states. Brief of Henderson at 8 *et seq.* The opposite inference is correct. If the Framers knew about such limits yet did not put them into the text of the Constitution, they must have chosen not to restrict the power granted to the state legislatures.

[18] The Framers knew that the authority they were giving to the states included the power to "gerrymander." They gave Congress the power to override any state regulation that Congress deemed contrary to the nation's interests. Ironically the power given to the states was not controversial, but Congress's proposed supervisory power was contested in the Convention. When Pinckney and Rutledge moved to strike the grant of power to Congress, Madison defended it:

> The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices.... It was impossible to foresee all the abuses that might be made of the discretionary power.... Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as *to favor the*

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Over time, Congress has repeatedly exercised its supervisory power. In 1842, Congress enacted a statute requiring all House representatives to be elected from single-member, contiguous districts. *See* Act of June 25, 1842, 5 Stat. 491. In 1872, Congress enacted a statute requiring vacant House seats to be filled by way of special elections held every second year on the first Tuesday in November. Act of Feb. 2, 1872, 17 Stat. 28. In 1882, Congress enacted a statute requiring congressional districts to contain "as nearly as practicable an equal number of inhabitants." Act of Feb. 25, 1882, 22 Stat. 5. In 1901, Congress enacted a statute requiring that congressional districts be compact as well as contiguous. Act of Jan. 16, 1901, 31 Stat. 733. Then, in 1929, Congress allowed all the aforementioned requirements but one to lapse. *See* Act of June 18, 1929, 46 Stat. 21; *Wood v. Broom*, 287 U.S. 1, 7 (1932). Today, the only constraint that Congress has placed on congressional redistricting in the states is the requirement that Representatives be elected from single-member districts, although election on a statewide basis is permitted under certain uncommon circumstances. *See* 2 U.S.C. §§ 2c, 2a(c); *see also Branch v. Smith*, 538 U.S. 254 (2003).

Although Congress has exercised its supervisory power before, it has never used that power to address intra-decennial redistricting. Because the legislatures have comprehensive power in the absence of congressional

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> *candidates they wished to succeed*. . . . What danger could there be in giving a controuling power to the Natl. Legislature?

II RECORDS OF THE FED. CONVENTION OF 1787 at 240 (M. Farrand ed. 1911) (1937 Revised ed.) (emphasis added). Madison's remarks show that the Framers knew that art. I, § 4 empowers the states to do precisely what has since become known as gerrymandering.

limitation, it follows that intra-decennial redistricting is within their discretion.

History shows that the generation that ratified the Constitution believed that state legislatures had the power to engage in intra-decennial congressional redistricting. Throughout the decade immediately following ratification of the Constitution, state legislatures regularly altered the way in which members of Congress were elected.

Pennsylvania's General Assembly adopted different plans for congressional elections in 1788, 1790, 1792 and 1794. *Compare* 13 Pa. Stat. at Large (1682-1801) at 140-45 (Oct. 4, 1788) (providing for the at-large election of eight representatives) *with* 14 Pa. Stat. at Large (1682-1801) at 20-23 (Mar. 16, 1790) (providing for eight congressional districts and one representative per district) *with* 14 Pa. Stat. at Large (1682-1801) at 271-74 (Mar. 16, 1791) (providing for the at-large election of thirteen representatives) *with* 15 Pa. Stat. at Large (1682-1801) at 171-74 (Apr. 22, 1794) (providing for twelve congressional districts and thirteen representatives). *Id.*[19]

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[19] The first federal elections in Pennsylvania "were in large measure the continuation of a struggle between two well-defined political parties." I DOCUMENTARY HISTORY OF THE FIRST FED. ELECTIONS 1788-1790 (Univ. of Wisc. Press 1976) at 229. The Pennsylvania Assembly seems to have chosen methods of election for Congress based on considerations of partisan advantage. In 1788, for example, most Federalists were in Philadelphia and district elections would have given them fewer seats than an at-large election. "By obliging the whole state to vote in one ticket, it is expected the Federalists will prevail by a majority of two to one in the choice of Representatives for the lower house of Congress." *Id.* at 302 (quoting Benjamin Rush). For the 1788 congressional elections, some states used at-large elections while others used districts. *Id., passim.*

During the same period, the New Jersey legislature flip-flopped on its congressional election policies. *Compare* N.J. Act of May 29, 1792 (providing for the at-large election of five representatives) *with* N.J. Act of Mar. 1, 1798 (providing for five congressional districts and one representative per district) *with* N.J. Act of Nov. 7, 1800 (providing for the at-large election of five representatives).[20] Massachusetts switched from having four multi-member districts in 1792 to having single-member districts in 1794. *Compare* Mass. Resolves, June 30, 1792, p. 25 *with* Mass. Act of June 26, 1794.

That state legislatures freely altered the way in which members of Congress were chosen from one election to the next and that the alterations were never challenged on constitutional grounds are facts that show intra-decennial changes were consistent with the legal and popular understanding of the newly-ratified Constitution.

Furthermore, intra-decennial congressional redistricting does not undermine the one-person, one-vote doctrine embodied by the Equal Protection Clause of the Fourteenth Amendment. The Appellants, here, argue that when state legislatures engage in intra-decennial congressional redistricting, lawmakers pursuing a partisan agenda are able to use their knowledge of post-census population shifts to produce congressional districts that appear (in light of the most recent decennial census data) to have populations equal to those in other congressional

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[20] New Jersey's switch back to at-large election for 1800 must have had partisan impact. *Amicus* does not know at this time which party sought advantage in New Jersey through such changes, but in 1800 there was a partisan realignment, with the Federalists losing and Jeffersonian Republicans taking control of the House.

districts but that in reality are packed with voters from the disfavored political party. However, their fears of such tactics, although unwarranted, should extend as well to the very first possible redistricting after a census. This is because decennial census data are *always* inaccurate, even at the moment they are released. The federal government takes approximately 1.3 years to complete a census and to release the attendant data, *see* U.S. CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS (Oct. 12, 2004), *available at* http://www.census.gov/dmd/www/genfaq.htm. Census data are afflicted by a minimum 13% margin of inaccuracy at the moment they are released. Assuming an additional, natural inaccuracy margin of 5% (a modest assumption, considering the large number of citizens who either refuse to participate in a typical census or participate multiple times),[21] decennial census data may be up to 18% inaccurate when released.

Nevertheless, the census represents the only attempt at an actual population count that the nation has.[22] It is

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[21] Undercount rates for the 2000 census may have been: 0.67% for non-Hispanic whites, 0.96% for Asians, 2.17% for blacks, 2.85% for Hispanics, and 4.74% for Native Americans and Alaskans. *See* PRESIDENTIAL MEMBERS, U.S. CENSUS MONITORING BD., FINAL REPORT TO CONG. 7 (2001). The undercount rate for blacks was more than 3% higher than the national undercount average in every decennial census between 1940 and 1990. Hogan and Robinson, *What the Census Bureau's Coverage Evaluation Programs Tell Us About Differential Undercount* § 1 (unpublished manuscript, presented at the Research Conference on Undercounted Ethnic Populations, May 5-7, 1993), *available at* http://www.census.gov/population/www/documentation/1993/conference.html.

[22] The Census Act requires an actual count of population to be used for apportionment. Section 195 of the Census Act, 13 U.S.C. § 195; *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 340 (1999) ("there is only one plausible reading of the amended § 195 [of

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not the Court's function to put a shelf-life date on it. Moreover, there has never been an instance of a court depriving an elected legislature of its right to exercise a continuing review and amendment of the laws under which we are governed.[23] A "one shot" rule would be both unprecedented and contrary to the fundamental nature of the legislative process in a democracy.

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the Census Act]: It prohibits the use of sampling in calculating the population for purposes of apportionment").

[23] Fears have also been expressed that intra-decennial redistricting will be used more frequently to improve margins of control in an increasingly polarized and partisan House. These fears are misplaced for two reasons.

Any experienced state legislator knows that redistricting consumes vast amounts of time and energy. Even when the same party is in the majority, the two chambers of the legislature can have difficulty reaching agreement, as the record in Texas shows. Therefore, states would not lightly undertake intra-decennial redistricting. It is not apparent that Texas has started a broad revival of the practices of the 1790s.

Furthermore, the House of Representatives is not polarized due to redistricting. The un-gerrymander-able Senate is at least (and perhaps more) polarized on a partisan basis. For example, in both the Clinton and Bush administrations, the Senate has been controlled by a partisan opposition that refused to bring many judicial nominations to a vote. *See* REHNQUIST, 1997-2002 YEAR-END REPORTS ON THE FEDERAL JUDICIARY.

CONCLUSION

Amicus curiae Senator Robert C. Jubelirer respectfully requests that this Court affirm the district court's judgment for the reasons stated above.

Respectfully submitted,

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IN THE

Supreme Court of the United States

EDDIE JACKSON; LEAGUE OF UNITED LATIN AMERICAN CITIZENS; TRAVIS COUNTY; GI FORUM OF TEXAS,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court of the Eastern District of Texas

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BRIEF OF *AMICI CURIAE* PROFESSORS GARY KING, BERNARD GROFMAN, ANDREW GELMAN, AND JONATHAN N. KATZ, IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICI CURIAE*

Amici are professors of political science, government, and statistics who have written, published, and testified about partisan bias in redistricting.[1] They have testified on behalf of States and of private parties. They have testified in favor of Democratic plans in some instances and in favor of Republican plans in others. They have written and published extensively on the subjects of voting rights and statistical methods and more specifically on redistricting. And they have won numerous prizes and awards for their work in this area. *Amici* take no position on whether the Texas redistricting plan at issue in this case is unconstitutional. Rather, they write to explain that an "agreed upon substantive principle[] of fairness in districting" exists. *Vieth v. Jubelirer*, 541 U.S. 267, 312-13 (2004) (Kennedy, J., concurring in the judgment).

Amicus Gary King (http://gking.harvard.edu) is the David Florence Professor of Government and the Director of the Institute of Quantitative Social Science at Harvard University. He has been elected Fellow of the American Association for the Advancement of Science, Fellow of the American Academy of Arts and Sciences, Fellow of the American Academy of Political and Social Science, President of the Society for Political Methodology, and Vice President of the American Political Science Association. Along with Andrew Gelman, he wrote the software program JudgeIt, which is a widely-used tool for measuring partisan bias in districting plans.

Amicus Bernard Grofman (http://www.socsci.uci.edu/~bgrofman/) is Professor of Political Science at the University of California, Irvine. He has been elected Fellow of the

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution toward its preparation or submission. By letters filed with the Clerk, counsel for all parties have consented to this filing.

American Academy of Arts and Sciences and President of the Public Choice Society. This Court cited his work in *Thornburg v. Gingles*, 478 U.S. 30, 52-53 & n. 20 (1986), and both this Court and other federal courts have cited his research on racial voting patterns and other topics related to elections.

Amicus Andrew Gelman (http://stat.columbia.edu/~gelman/) is Professor of Statistics and Professor of Political Science at Columbia University. He has been elected Fellow of the Institute of Mathematical Statistics and Fellow of the American Statistical Association, and is the founding director of the Quantitative Methods in the Social Sciences program at Columbia. As noted, he and Gary King wrote the software program JudgeIt.

Amicus Jonathan N. Katz (http://jkatz.caltech.edu/) is the Co-Director of the Caltech/MIT Voting Technology Project. He is Professor of Political Science at the California Institute of Technology and Director of Graduate Studies for the Social Sciences. He is also currently a Fellow at the Center for Advanced Study in the Behavioral Science at Stanford University. He is on the editorial boards of *Political Analysis*, *Political Research Quarterly*, and the *American Journal of Political Science*.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the partisan gerrymandering context, this Court has not adopted any governing rule to determine whether a plan is unconstitutional. The Court may or may not choose to do so in this case. If the Court chooses to do so, however, a principle known as the symmetry standard presents a "substantive definition of fairness in districting" that "command[s] general assent." *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment). The symmetry standard compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the

same given percentage of the vote. The difference in how parties would fare in terms of legislative seats is the "partisan bias" of the electoral system.

While *amici* take no position on whether this Texas plan is constitutional, the ability to measure partisan bias using objective and neutral criteria allows this Court to determine when a particular plan crosses the constitutional threshold. Three potential approaches are (1) a rule that creates as little partisan bias as possible; (2) a rule that prevents a political party from gaining a seat to which it otherwise would not be entitled; or (3) a rule prohibiting egregious gerrymanders that show a bias over a certain percentage.

ARGUMENT

I. THE "SYMMETRY STANDARD" DEFINES PARTISAN FAIRNESS IN LEGISLATIVE REDISTRICTING

"The object of districting is to establish 'fair and effective representation for all citizens.'" *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-68 (1964)). This Court and other courts consistently determine whether States have crossed the constitutional line by drawing districts in a manner that impermissibly burdens one group or another. In the racial context, for example, courts have examined the shape and appearance of district lines in order to resolve whether a State was engaging in a racial gerrymander. *See, e.g, Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Shaw v. Reno*, 509 U.S. 630 (1993).

In the partisan gerrymandering context, dissenting Justices have proposed examining a variety of criteria such as shape, compactness, contiguity, and respect for political subdivisions in order to determine whether a plan unconstitutionally burdens a particular group. *See, e.g., Davis v. Bandemer*, 478

U.S. 109, 165 (1986) (Powell, J., dissenting) (looking to the "configurations of districts, the observance of political subdivision lines, and other criteria that have independent relevance to the fairness of districting"); *Vieth*, 541 U.S. at 335 (Stevens, J., dissenting); *id.* at 347-48 (Souter, J., dissenting). While all of these criteria may have some value, they are simply proxies for determining what is normally the fundamental issue in partisan gerrymandering cases: whether a districting plan unfairly burdens the representational rights of a particular political group.

As this Court has recognized, because criteria such as compactness and traditional political boundaries are merely proxies, they do not provide judicially-manageable standards that courts can apply in politically-neutral and even-handed ways. *See, e.g., Vieth*, 541 U.S. at 307-309 (Kennedy, J., concurring in the judgment); *id.* at 289-90 (plurality opinion); *id.* at 359-60 (Breyer, J., dissenting); *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring in the judgment). In addition, as legislators employ more and more sophisticated tools for redistricting, they can comply quite easily with some of these criteria while still burdening the right to fair and effective representation through political gerrymandering. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (recognizing that technology gives parties even more "temptation to use partisan favoritism in districting").

In evaluating political fairness, social scientists do not use proxies to measure the existence and extent of partisan bias. Instead, they have defined a clear and appropriate standard for what constitutes partisan fairness. It is called the symmetry standard. The symmetry standard was not before the Court in *Vieth*, 541 U.S. at 267.

The symmetry standard measures fairness in election systems, and is not specific to evaluating gerrymanders. The symmetry standard requires that the electoral system treat similarly-situated political parties equally, so that each

receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage. In other words, it compares how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote. The difference in how parties would fare is the "partisan bias" of the electoral system. Symmetry, however, does not require proportionality.

For example, suppose the Democratic Party receives an average of 55% of the vote total across a state's district elections and, because of the way the district lines were drawn, it wins 70% of the legislative seats in that state. Is that fair? It depends on a comparison with the opposite hypothetical outcome: it would be fair only if the Republican Party would have received 70% of the seats in an election where it had received an average of 55% of the vote totals in district elections. This electoral system would be biased against the Republican Party if it garners anything fewer than 70% of the seats and biased against the Democratic Party if the Republicans receive any more than 70%.

In other words, the symmetry standard is that "each political group in a State [has] the same chance to elect representatives of its choice as any other political group." *Davis v. Bandemer*, 478 U.S. at 124. The symmetry standard is a "clear, manageable, and politically neutral" measure of "the particular burden a given partisan classification imposes on representational rights." *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment). The symmetry standard can be used in all types of election systems and districting arrangements, such as single-member districts, multimember districts, or any other valid electoral rule. Moreover, it works regardless of the number of parties that field candidates. *See, e.g.*, Gary King, *Electoral Respons-*

iveness and Partisan Bias in Multiparty Democracies, 15 Leg. Stud. Q., 159, 163-65 (1990).[2]

The symmetry standard has been the subject of scholarly work for at least three decades. *See, e.g.*, Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*. 67 Am. Pol. Sci. Rev. 540 (1973); Bernard Grofman, *Measures of Bias and Proportionality in Seats-Votes Relationships*, 9 Am. Pol. Sci. Rev. 295, 327 (1983); Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 Am. J. Pol. Sci. 514 (1994). The scholarly literature has been united in supporting the symmetry standard as the definition of partisan fairness in electoral systems at least since the clarification of the standard introduced by Gary King and Robert X. Browning in *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am. Pol. Sci. Rev. 1251 (1987). *See, e.g.*, Dennis Thompson, *Election Time: Normative Implications of Temporal Properties of the Electoral Process in the United States*, 98, Am. Pol. Sci. Rev. 51, 53 n. 7 (2004); Thomas W. Gilligan & John G. Matsusaka, *Structural Constraints On Partisan Bias Under The Efficient Gerrymander*,

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[2] Indeed, the symmetry standard is itself a reflection of fundamental American tenets such as fairness and equality of treatment. It stems from the same principle that drives the belief that the legislative candidate with the most votes in a district should win the seat. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."). In particular, elections are "fair" when they set objective and symmetrical guidelines for determining who wins: One candidate can win with a plurality of votes because if another candidate had received a plurality of votes instead, that other candidate would have won the seat. Fairness exists because the political process treats each candidate equally. The symmetry standard takes this same principle and applies it to political groups at the statewide level.

100 Pub. Choice 65, 65 (1999); Ernesto Calvo & Maria Victoria Murillo, *Who Delivers? Partisan Clients in the Argentine Electoral Market*, 48 Am. J. Pol. Sci. 742, 747 (2004); Erik J. Engstrom & Samuel Kernell, *Manufactured Responsiveness: The Impact of State Electoral Laws on Unified Party Control of the Presidency and House of Representatives, 1840-1940*, 49 Am. J. Pol. Sci. 531, 541 (2005). In short, "[s]cholars have reached near consensus on *partisan symmetry* as a standard of partisan fairness and have made great progress on developing measures that can be used to see whether electoral systems and districting plans meet this standard." Gary King, John Bruce & Andrew Gelman, *Racial Fairness in Legislative Redistricting*, in *Classifying by Race* 85, 85 (Paul E. Peterson, ed., 1996).

The symmetry standard also is a regular feature of expert testimony in redistricting litigation. Experts representing both political parties use it, as do neutral officials such as courts and non-partisan members of redistricting commissions. Indeed, in this very litigation, experts from both sides used the symmetry standard to ascertain whether the plan was biased. *See* Expert Report of John R. Alford at 26-27 & Graph 2, Jackson Pls. Exh. 44 (Expert for Plaintiffs); Expert Report of Ronald Keith Gaddie, Jackson Pls. Exh. 141 at 18-22 & Fig. 1 (Expert for the State); Gaddie Report at 18 (noting that the three-judge panel which drew the non-partisan map in 2001 measured partisan bias by using the approach "widely accepted by the experts involved in this matter, and it is the approach used here to facilitate comparison").

Measuring symmetry and partisan bias does *not* require "proportional representation" (where each party receives the same proportion of seats as it receives in votes). Of course, an electoral system that is proportional, like any electoral

system, may treat the parties symmetrically and thus fairly.[3] Yet symmetry can exist (or not exist) in all types of electoral systems. Because most electoral systems in the United States are single-member districts that are winner-take-all, in practice they normally give a "bonus" of varying sizes (above proportionality) in seats to the party that wins a majority of the votes across a state. This common pattern does not violate the symmetry standard.[4] Nothing in the symmetry standard prevents States, either directly or because of the way in which districts happen to be drawn, from giving a greater percentage of seats to the victorious party than that party's total vote proportion. Indeed, in States where the plan is "fair" either because of bipartisan redistricting or a neutral districting commission, symmetry exists in complete harmony with the "bonus" given to the majority party due to the United States' single-member district system.

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[3] Electoral systems that mandate versions of proportional representation do not necessarily produce partisan symmetry. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1257 Fig. 2 (modeling bias in a proportional representation system). Many European nations that use proportional representation have electoral systems that show partisan bias. *See* King, *Electoral Responsiveness*, 15 Leg. Stud. Q. at 174 & Tbl. 3.

[4] Partisan bias is the deviation from partisan symmetry. A separate concept is "electoral responsiveness." Electoral responsiveness indicates how responsive changes in seat outcomes are to changes in voter preferences. Electoral responsiveness, also referred to as the "bonus" for the majority party, the "swing ratio," or the "degree of representation," measures how much the seat division between the parties change as the vote proportions change. A purely proportional system is one in which a one percent increase in the votes for a party leads to a one percent increase in seats for that party. In the United States, a one percent increase in votes for a party normally leads to a two to three percent increase in seats. Under the symmetry standard, there is nothing necessarily unfair about one party winning a greater proportion of seats than the other. An electoral system may have any degree of partisan bias, no matter what level of responsiveness happens to exist. See Browning & King, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1254-58 & 1259 Fig. 3.

The guiding test of the symmetry standard is whether the map treats similarly-situated parties equally—whether both parties have the *opportunity* to capture the same amount of seats, if they receive a particular percentage of the statewide vote. That the Democratic Party may receive only 38% of the seats if it receives 45% of the Statewide vote matters only in comparison to how the Republican Party would fare if it receives 45% of the Statewide vote.

II. WELL-ACCEPTED AND WIDELY USED METHODS EXIST FOR MEASURING THE PARTISAN BIAS OF PROPOSED LEGISLATIVE REDISTRICTING PLANS

A consensus exists about using the symmetry standard to evaluate partisan bias in electoral systems. But such a consensus does not answer the subsidiary question: how to measure symmetry itself in order to determine whether partisan bias exists. Over the more than thirty years that scholars have worked on defining fairness as partisan symmetry, they also have developed a sequence of closely related, and steadily improving, statistical methods that measure the degree of partisan bias in proposed legislative redistricting plans. These methods, outlined in the articles cited in Section I, rely on well-tested and well-accepted statistical procedures.

Statistical methods and computer software using the symmetry standard examine all relevant election-related data, and employ an approach to calculate the difference in seats that the two parties would receive at a given vote level.[5] Using well-accepted techniques, these models allow experts to measure the number of seats that a party would win at a

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[5] This brief provides a relatively non-technical introduction to the research methodology used in the field. The articles cited in the text, published in peer-refereed academic journals, describe the methodology more fully.

given vote level. And the methods can separate partisan bias from other factors. While the actual inputs may vary to some degree from approach to approach, most rely on details of the proposed redistricting plans, all recent election results, the presence of an incumbent in the district, and whether the race is contested. Gelman & King, *Unified Method*, 38 Am. J. Pol. Sci. at 523-25. Other factors may include party registration data, prior party control of the district, candidate quality, and demographic characteristics of the voting age population. *Id.* at 525-26.[6]

Experts can disagree about which set of input data is relevant for a given case, but the resulting measures of partisan bias normally will not differ to any significant degree.[7] Because social scientists studying partisan bias rely on the

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[6] Any number of programs, both commercial and free, can analyze the relevant data to measure partisan bias.

[7] The methodology of quantifying the amount of partisan bias in a particular plan of course is subject to the standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 573, 573-75 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149-52 (1999), as is any application of statistical methodology. While the standard methodology for measuring symmetry and partisan bias is well-established, peer-reviewed, and reliable, the question whether it meets *Daubert* is not a question that this Court needs to decide in order to adopt the symmetry standard. Rather, courts will apply the traditional criteria for admitting expert evidence and determine in each case (1) whether the experts are qualified; and (2) whether their particular methodology is reliable. Indeed, a similar process already exists in other voting rights contexts. Under *Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986), and its progeny, courts regularly use statistics to determine racial bloc voting and to decide whether a minority group can elect a candidate of its choice. In each instance, the court must make a judgment about the expert and the methodology. For a thorough discussion of the different statistical standards used to determine whether a plaintiff has met the *Gingles* test and their reliability, see *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 995-1005 (D.S.D. 2004) (discussing the various standards and surveying cases that apply these standards).

symmetry standard as the baseline for attempting to calculate the degree of bias, any difference of opinion is limited in scope and concerns chiefly the methodology used to calculate the percentage of seats that a particular party would receive at a given vote level. In practice, these differences have been minor.

Models applying the symmetry standard are by their nature predictive, just as the legislators themselves are predicting the potential impact of the map on partisan representation. The symmetry standard and the resulting measures of partisan bias, however, do not require forecasts of a particular voting outcome. Rather, by examining all the relevant data and the potential seat divisions that would occur for particular vote divisions, it compares the potential scenarios and determines the partisan bias of a map, separating out other potentially confounding factors. Importantly, those drawing the map have access to the same data used to evaluate it, and no data is required other than what is in the public domain. The question is not whether a particular party *will* win; it is whether one party has stacked the deck to such a degree that the plan burdens the other party's "rights of fair and effective representation." *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). *Cf.* Doris Kearns Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln* 209 (2005) (noting that in the 1858 Lincoln-Douglas Senatorial election, Lincoln lost even though he received a majority of votes cast because the State Legislature, which picked Senators at the time, was heavily gerrymandered for the Democrats).

III. THE SYMMETRY STANDARD ALLOWS THIS COURT TO DECIDE BY POLITICALLY-NEUTRAL AND OBJECTIVE PRINCIPLES WHETHER A PARTICULAR PLAN IS OVERLY PARTISAN

The ability to quantify partisan bias in a redistricting plan, and to distinguish partisan bias from other factors, permits this Court to adopt a rule that prevents gerrymandering from inhibiting a political group's representational rights. *Amici* take no position on how this Court could best implement a test for unconstitutional partisan gerrymandering that is based on evaluating the level of partisan bias in a plan. Yet the symmetry standard and the methodology applying it are just as "clear, manageable, and politically neutral," *Vieth*, 541 U.S. at 307-08 (Kennedy, J., concurring in the judgment)—if not more so—than other standards used to evaluate districting plans. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 55-61, 74-77 (1986) (using statistics to determine the existence of racial bloc voting, a necessary part of any § 2 claim); *Shaw v. Reno*, 509 U.S. 630, 646-49 (1993) (explaining how to decide whether a racial gerrymander is unconstitutional and examining "appearance," among other factors); *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (discussing influence and coalitional districts and noting that "[t]he ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine"). And this Court's jurisprudence in other voting rights contexts suggests three different possible approaches for using the symmetry standard to determine the existence of an unconstitutional partisan gerrymander.

First, this Court could announce a rule of allowing a State to engage in as little partisan bias as necessary to further other compelling interests. In the one-person, one-vote context, this Court has required zero deviation for Congressional districts, while still permitting the State to justify any dis-

crepancy in population with a showing of compelling need. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 740–41 (1983). Moreover, the State need only achieve complete population equality "as nearly as practicable." *Id.* at 730. So long as a State attempts in good faith to create equal districts, the plan passes constitutional muster. *Id.* at 730-31.

The symmetry standard allows this Court to announce a similar rule in the partisan gerrymandering context: States must make a good-faith effort to achieve as little partisan bias as possible. States could justify any deviation by pointing to a legitimate interest such as compactness, respecting municipal boundaries, or preserving the core of prior districts. *Cf. id.* at 740.

States can comply with the "as little as possible" rule quite simply. The sophistication of computer mapping technologies allows States to add "no partisan bias" to their criteria in creating a redistricting plan. *Cf. id.* at 733 (noting that in 1983, "[t]he rapid advances of computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal population and at the same time to further whatever secondary goals the State has"). Whenever a State redistricts, it is possible to measure the partisan bias in a plan using the symmetry standard. Likewise, States know the total population before redistricting, and because application of the one-person, one-vote standard is simple, relatively little litigation results. Just as in the one-person, one-vote context, if this Court sets a clear rule beforehand, the amount of litigation about the rule post-issuance would be relatively limited. Finally, a rule of "as little as possible" captures both the "subtle" and the "blatant" gerrymander, each of which burdens a group's representational rights. *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment).

Second, this Court could establish a rule that prevents partisan bias to the extent that it allows the manipulating

party to gain control of one or more legislative seats to which it otherwise would not win. In other words, the symmetry standard allows courts to propound a simple and politically-neutral rule—whether the proposed map is so partisan that, as compared to a politically neutral map, it would cause one party to lose a legislative seat. Through the use of experts, a plaintiff would have to prove that a map would cause a group to lose a seat. *Cf. Gingles*, 478 U.S. at 44-46 (imposing a test for justiciability under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, that requires a showing that the minority population is "sufficiently large and compact to constitute a majority in a single-member district" so there exists a potential remedy plan with at least one more district in which minorities have a realistic opportunity to elect candidates of choice than is found in the challenged plan).

Third, this Court could allow partisan bias in districting so long as it does not rise above a certain percentage. The symmetry standard allows courts to calculate the percentage difference in seats that a party would receive at any given level of the vote. If the average percentage difference between the two parties is above a particular threshold (whether it be 3, 5, or 10%), the plan would be unconstitutional. For example, if the court set the standard at 10%, a plan would not be unconstitutional unless the Democratic Party would capture 55% of the seats with 50% of the vote whereas the Republican Party would capture only 45% of the seats with 50% of the vote. *Cf. Brown v. Thompson*, 462 U.S. 835 (1983) (above 10% population deviation is *prima facie* unconstitutional for state legislative districts); *id.* at 852 (outlining test for determining when a plan is unconstitutional).

This third approach allows courts to consider what level of partisan gerrymandering is unconstitutionally "egregious." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Studies of past partisan gerrymanders have shown that many gerrymanders have a partisan bias of 1-3 percentage points. In egregious cases, the difference is

greater than 5 percentage points, and it is only in the very rare and extreme case that a gerrymander results in a difference of over 10 points. Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 Am. Pol. Sci. Rev. 541, 546 Fig. 2 (1994) (showing 15 states over a twenty-year period where the partisan bias rarely exceeded 5 percentage points and never exceeded 10 percentage points); Gary King, *Representation through Legislative Redistricting: A Stochastic Model*, 33 Am. J. Pol. Sci. 787, 814 (1989) (noting that the effect of the partisan gerrymander passed by Connecticut in the early 1970s that was at issue in *Gaffney v. Cummings*, 412 U.S. 735 (1973), was 3 percentage points); Robert X. Browning & Gary King, *Seats, Votes, and Gerrymandering: Estimating Representation and Bias in State Legislative Redistricting*, 9 Law & Pol'y 305, 318 (1987) (examining the Indiana plan in the 1980s that was the subject of *Davis v. Bandemer* and concluding that the House plan had a bias of 6.2 percentage points while the Senate plan had a bias of 2.8 percentage points); King & Browning, *Democratic Representation*, 81 Am. Pol. Sci. Rev. at 1262 Fig. 5 (showing bias in all States, with the plurality showing little if any bias, the vast majority falling within 5 percentage points, a few between 5 and 10, and even fewer above 10); *id.* at 1269 (listing bias figures for all States and showing only one State with a bias of above 10 percentage points); Gary W. Cox & Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* 57-59 (2002) (finding extreme cases of gerrymandering at as much as 8 percentage points).

A rule that tolerates a particular degree of partisan bias would recognize that this Court is willing to permit some amount of burden on the rights of political groups in exchange for limited court involvement in only the most extreme of cases. As experience has shown, and as this Court has recognized, savvy legislators will take advantage of all the leeway that this Court will allow. *Cf. Karcher*, 462 at 731

("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."). Yet even a rule that policed only extreme cases would curtail some abuses. *Cf.* Gelman & King, *Enhancing Democracy*, 88 Am. Pol. Sci. Rev. at 541 (noting that while a redistricting plan may increase partisan bias in a particular instance, regular redistricting every ten years leads to less partisan bias than no redistricting at all over a period of decades).

Regardless of any rule that this Court adopts—especially if it is no rule—redistricting always will be political to some degree. Yet not all political consequences lead to an unconstitutional burden on the minority party. Any rule limiting partisan gerrymandering still preserves some political component to redistricting. Decisions of where to draw the lines and what communities to include inevitably have some political fallout. The symmetry standard does not necessarily affect the decision of where to place politically-sensitive land. *Cf. Vieth*, 541 U.S. at 358 (Breyer, J., dissenting). Moreover, the majority party may well decide to give the party that wins a majority of the vote (say 51%) an even-greater majority of seats (say 60%). Such a plan favors the majority party, but would not be unconstitutional under any approach so long as the minority party could win the same 60% of seats if it receives 51% of the vote.

And if this Court adopts any rule based on the symmetry standard, lower courts and this Court will flesh out the particulars of the rule in the future. Indeed, in the one-person, one-vote context, once this Court determined the general standards in *Reynolds v. Sims*, 377 U.S. at 377, and *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964), subsequent cases simply became legal arguments about exactly what level of population deviation was unconstitutional in given circumstances. *See, e.g., Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Mahan v. Howell*, 410 U.S. 315 (1973); *White v. Weiser*, 412 U.S.

783 (1973); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *White v. Regester*, 412 U.S. 755 (1973); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thompson*, 462 U.S. at 835; *Karcher v. Daggett*, 462 U.S. at 725; *Larios v. Cox*, 300 F.Supp. 2d 1320 (N.D. Ga. 2004) (three-judge panel) (per curiam), *aff'd*, 542 U.S. 947 (2004). Similarly, this Court could set a general rule prohibiting partisan gerrymanders, and let courts decide the specifics of the issue as facts develop in the future. *Cf. Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) (suggesting that no manageable standard developed after *Davis v. Bandemer* because lower courts could do nothing except follow that decision); *id.* at 344-45 (Souter, J., dissenting) (same).

The signatories of this brief take no position on whether the particular Texas plan in this case is unconstitutional. None has independently examined the partisan bias in the current Texas map. The symmetry standard has achieved consensus within the social science community as a measure of bias because it is a politically-neutral measure that does not require examining proxies such as shape of the district, compactness, or traditional political boundaries. Instead, it evaluates the bias directly by comparing whether the plan treats similarly-situated parties similarly. Regardless of the merits of this particular lawsuit, the symmetry standard is "a suitable standard[] with which to measure the burden a gerrymander imposes on representational rights." *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment).

CONCLUSION

In deciding this case, this Court should take into consideration the symmetry standard, as it measures partisan bias itself and it allows courts to decide in a politically-neutral and objective manner whether the State's plan is fair to all political groups.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*, *Appellees*.

TRAVIS COUNTY, TEXAS, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

EDDIE JACKSON, *et al.*, *Appellants*,

v.

RICK PERRY, *et al.*, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

BRIEF FOR AMICI CURIAE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES AND LEAGUE OF WOMEN VOTERS OF TEXAS IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether claims that a state legislature lacked any nonpartisan basis for a threshold decision to engage in redistricting are justiciable and state a constitutional violation.

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INTEREST OF AMICI[1]

This brief is submitted on behalf of the League of Women Voters of the United States and the League of Women Voters of Texas (collectively, "the League"). The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, it is organized in more than 850 communities and in every State, with more than 150,000 members and supporters nationwide. The League of Women Voters of Texas, with 3000 members grouped into 32 local organizations, is affiliated with, but separately incorporated from, the League of Women Voters of the United States. It actively opposed the districting plan at issue in this case.

One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, and that assures opportunities for effective voter participation in government decisionmaking. To that end, the League espouses four basic principles for protecting the integrity of the electoral process. First, the bedrock "one person, one vote" guarantee of *Reynolds* v. *Sims*, 377 U.S. 533 (1964), should encompass not only mathematical proportionality in congressional districts, but also the right to an effective vote and responsive representation. Second, the redistricting process should promote full political participation by minority voters. Third, the redistricting process should be transparent and open to public participation.

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[1] In compliance with Rule 37.6 of this Court, amici curiae state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than these amici curiae, their members or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

Finally, and most relevant to this case, partisan gerrymandering subverts the democratic system because it allows *politicians* to choose their *voters*, rather than vice versa, and thereby compromises the incentives of those politicians to respond to the preferences of their constituents.

SUMMARY OF ARGUMENT

The constitutional design requires the House of Representatives to represent the views of the people as closely as possible. State legislatures thwart that purpose when they gerrymander congressional districts for nakedly partisan advantage, concentrating the minority party's voters in as few districts as possible while ensuring margins sufficient to guarantee the election of the majority party's candidates in the other districts. Such gerrymanders produce districts in which the only seriously contested elections are party primaries, which tend to favor the politicians most committed to the party's national agenda rather than the views of the district's voters as a whole. Recent studies confirm that such gerrymanders, while rewarding party activists, undermine the responsiveness of Congress to the body politic. And such gerrymanders present special concerns when they occur not just after each decennial census, but, as here, in the middle of the decade as well, enabling partisans to fine-tune district boundaries to their advantage in advance of each congressional election.

In *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), all nine Justices appeared to agree that excessive partisanship in redistricting threatens democratic principles and violates the Constitution. They disagreed about whether, under the political question doctrine, courts could enforce that constitutional prohibition with judicially manageable rules. This case presents a textbook example of the availability of such rules.

For justiciability purposes, the Court should distinguish between two categories of excessive-partisanship challenges to state redistricting decisions. The first category consists of challenges, like this one, to a State's threshold decision to

engage in any redistricting in the first place. The second category consists of challenges, like that in *Vieth*, to the details of whatever lines a State ultimately draws. The justiciability concerns the plurality expressed in *Vieth* arose in connection with the multifaceted inquiry a court must conduct when presented with a challenge to a State's choice of one among thousands of possible district plans. Those concerns are far less substantial where, as here, the challengers claim simply that the State has demonstrated no plausible neutral basis for its threshold decision to redraw any district lines at all. Such claims are plainly justiciable.

They likewise state a clear constitutional violation. Under any level of equal protection scrutiny, the government must justify any action it takes by reference to *some* legitimate state interest. Promoting the interests of one political association at the expense of another—while a perfectly legitimate goal for a political party—is not a legitimate *state* interest.

Of course, the presence of a partisan objective would not necessarily invalidate a state redistricting decision if, in the absence of that objective, the State would have engaged in redistricting anyway for non-pretextual neutral reasons. But a partisan objective cannot itself justify such a decision. Here, appellants claim, quite plausibly, that the State acted for no purpose beyond advancing one party to the detriment of the other and would not have redrawn the existing district lines but for that partisan purpose. For our political system to function properly, the Judiciary not only can, but must resolve such claims on the merits, and should grant relief when the facts support the challengers. The courts are the only institutions that can be realistically expected to protect the political system from partisan gerrymanders.

ARGUMENT

As discussed in Part I below, excessive partisanship in redistricting decisions thwarts basic democratic principles, a concern expressed by all nine Justices in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004). A key question in this case is whether

the courts can devise judicially discernible and manageable standards for protecting the redistricting process from excesses of partisanship. The answer to that question, as discussed in Part II, is yes—particularly in cases that, like this one, present a simple challenge to a State's threshold, yes-or-no decision to engage in *any redistricting at all*.

I. EXCESSIVE PARTISANSHIP IN REDISTRICTING DECISIONS UNDERMINES EFFECTIVE REPRESENTATION

By constitutional design, the United States House of Representatives "is so constituted as to support in [its] members an habitual recollection of their dependence on the people." Federalist No. 57. House members are directly elected (unlike presidents); they serve two-year terms (unlike senators); and, in all but the smallest seven States, they represent only portions of their home States. Members of that body therefore have a unique capability—and responsibility—to advocate policies supported by their constituents. *See id.*; *see also Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964).

The manner in which a State reapportions congressional districts is critical to ensuring the responsiveness of that State's House delegation. As this Court has explained, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live .... Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." *Wesberry* v. *Sanders*, 376 U.S. 1, 17-18 (1964). To ensure that the electoral process promotes that right, the "basic aim" of any districting plan must be the "fair and effective representation of all citizens." *Reynolds*, 377 U.S. at 565-566; *see also Davis* v. *Bandemer*, 478 U.S. 109, 125-126 n.9 (1986).

To that end, the States may legitimately follow many criteria in establishing congressional districts. One important goal in redistricting is the preservation of identifiable communities of interest. *See, e.g., Shaw* v. *Reno*, 509 U.S. 630, 646 (1993). Other important goals recognized by this

Court include "compactness, contiguity, and respect for political subdivisions." *See id.* at 647. But one characteristic of any "fair and effective" redistricting objective, *Reynolds*, 377 U.S. at 565-566, is a bedrock of political neutrality. While any redistricting policy is bound to have at least some effect on electoral outcomes, there is a stark difference in kind between, on the one hand, relying on neutral considerations that incidentally affect partisan outcomes and, on the other, adopting exclusively partisan criteria for which specific partisan outcomes are the *goal*.

Districts based on legitimately nonpartisan concerns are more likely to elect responsive members of Congress simply because elections in such districts tend to be more competitive. Politically gerrymandered districts are designed to cram members of the minority party into a small number of districts to dilute their votes and, in all other districts, to assure margins large enough to ensure victory for the candidates of the majority party. New software has made it easy to draw district lines that maximize political power for the favored party and minimize it for the disfavored party. *See, e.g., Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The most contested election in such a district is typically a party primary, which favors the candidate that appeals most to the base of his or her party. The result is a highly polarized Congress composed of partisans bound to promote national party agendas rather than the interests of their diverse constituents. *See* Jason M. Roberts & Steven S. Smith, *Procedural Contexts, Party Strategy, and Conditional Party Voting in the U.S. House of Representatives, 1971-2000*, 47 Am. J. Pol. Sci. 305 (2003) (discussing explanations for increased polarization in Congress, including changes in electoral conditions, party strategies, and policy agendas); *cf. Shaw*, 509 U.S. at 648 (Elected officials in districts drawn for racial reasons "are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.").

In short, partisan gerrymandering, like racial gerrymandering, "weaken[s] the link between popular opinion and electoral results" and thereby "contributes to the popular perception that elections do not matter, to the insulation of incumbents from political accountability, and to increased partisanship and extremism in legislative bodies." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. & Pub. Pol'y 103, 112 (2000).[2] This is not a matter of mere speculation. Empirical studies confirm that, as partisan gerrymandering has become more sophisticated and effective, members of Congress have become measurably less responsive to changes in their districts' ideological composition. *See* Stephen Ansolabehere et al., *Old Voters, New Voters, and the Personal Vote: Using Redistricting to Measure the Incumbency Advantage*, 44 Am. J. Pol. Sci. 17, 31 (2000). It is also revealing that, precisely as the architects of political gerrymanders

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[2] *See also Vieth*, 541 U.S. at 316-317 (Kennedy, J., concurring in the judgment) ("The ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government, and in the citizenry itself. Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the interests of our political order. Nor should it be thought to serve our interest in demonstrating to the world how democracy works. Whether spoken with concern or pride, it is unfortunate that our legislators have reached the point of declaring that, when it comes to apportionment, 'We are in the business of rigging elections.'" (quoting state senator)); *id.* at 330 (Stevens, J., dissenting) ("Gerrymanders subvert th[e] representative norm [of responsiveness] because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles."); *id.* at 343-344 (Souter, J., joined by Ginsburg, J., dissenting) (describing fairness principle implicit in redistricting as "each political group in a State having the same chance to elect representatives of its choice as any other political group" and noting that "[i]t is undeniable that political sophisticates understand such fairness and how to go about destroying it" in redistricting (quotation omitted)); *id.* at 361 (Breyer, J., dissenting) ("Where unjustified entrenchment takes place, voters find it far more difficult to remove those responsible for a government they do not want; and the[] democratic values [of responsiveness to the popular will] are dishonored.").

intended, the 2002 general elections for House seats were the least competitive in United States history. Richard H. Pildes, Foreword: *The Constitutionalization of Democratic Politics*, in *The Supreme Court, 2003 Term*, 118 Harv. L. Rev. 28, 62 (2004); *see also* Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 477 (2004).

Finally, the dangers inherent in partisan gerrymandering are particularly acute where, as in this case, a State engages in mid-decade redistricting even though a lawful district plan is already in effect. Until the mid-decade redistricting at issue here, and recent mid-decade redistricting by Colorado and Georgia, States normally drew new district lines only once per decade after a new census was taken, even though partisan considerations played a role in the placement of those lines. Although such gerrymanders often skew the first election after they are implemented, their effects tend to wane over the life of the ten-year cycle.[3] A key reason is that populations within a district, and the politics of those populations, change unpredictably over time. *See Karcher* v. *Daggett*, 462 U.S. 725, 732 (1983) ("[T]he well-known restlessness of the American people means that population counts for particular localities are outdated long before they are completed."). So long as redistricting is conducted only once per decade, therefore, members of Congress seeking to represent such districts have strong incentives to accommodate those changes in their voting records. *See* Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 771 (2004); *see also People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221, 1242 (Colo. 2003) (strik-

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[3] *See, e.g.*, Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 Election L.J. 2, 10 (2005) (the effects of partisan gerrymandering are "unlikely to last very long, much less the entire decade until the post-census reapportionment"); Richard G. Niemi & Laura R. Winsky, *The Persistence of Partisan Redistricting Efforts in Congressional Elections in the 1970s and 1980s*, 54 J. Pol. 565, 571 (1992) (summarizing studies demonstrating diminution of effect of partisan gerrymandering over the ten-year cycle).

ing down Colorado redistricting plan enacted in the middle of a decade on state constitutional grounds).

The party in control of a state legislature can undermine those incentives by redrawing district lines more often. *See Salazar*, 79 P.3d at 1242 (if district lines changed more than once a decade, "a congressperson would be torn between effectively representing the current constituents and currying the favor of future constituents"). Start-of-decade redistricting happens randomly from a political perspective—that is, parties cannot choose to redistrict at the moment when it helps them the most. But when States reapportion districts more frequently, parties in power have the means to lock in gains whenever possible. *See id.*; *see also Vieth*, 541 U.S. at 364 (Breyer, J., dissenting). Of course, this means that parties could—and, in most cases, would—redistrict every time they regained control of state legislatures, leading to greater polarization, less compromise, and less responsiveness to the body politic.

II. Claims That A State Legislature Lacked Any Non-Partisan Basis For A Threshold Decision To Engage In Redistricting Are Justiciable And State A Clear Constitutional Violation

Despite their disagreements, all nine Justices in *Vieth* agreed that, at some point, naked partisanship in redistricting decisions can so severely damage the integrity of the political process as to violate the Constitution. The plurality acknowledged "the incompatibility of severe partisan gerrymanders with democratic principles" and agreed with Justice Kennedy and the dissenters that "an excessive injection of politics is unlawful." 541 U.S. at 292-293 (emphasis and internal quotation marks omitted). The question here is whether the courts can and should intervene to protect the political process where a state government demonstrates no neutral, non-partisan justification for a decision to engage in redistricting in the first place. The answer is yes. Judicial oversight of such a decision is plainly subject to judicially discoverable and manageable standards, and indeed is critical to our democracy.

A. Appellants' Excessive-Partisanship Claim Is Justiciable

The *Vieth* plurality concluded that all excessive-partisanship challenges to a redistricting scheme are nonjusticiable under the political question doctrine on the theory that they inevitably present "a lack of judicially discoverable and manageable standards." 541 U.S. at 277-278 (plurality opinion) (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). A majority of the Court, however, rejected that conclusion. As Justice Kennedy observed: "If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated." *Id.* at 312 (Kennedy, J., concurring in the judgment). "If that is so," he added, "we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive"—and that the courts would properly invalidate the enactment. *Id.* Each of the four dissenting Justices likewise affirmed that excessive-partisanship claims can be susceptible to judicially manageable rules. *See id.* at 323-325 (Stevens, J., dissenting); *id.* at 343-344 (Souter, J., joined by Ginsburg, J., dissenting); *id.* at 355 (Breyer, J., dissenting).

This case likewise presents basic questions about the justiciability of excessive-partisanship challenges to redistricting decisions. In one key respect, however, this case is more obviously susceptible to judicial resolution. That is not just because these plaintiffs claim that naked partisanship formed the sole basis—rather than, as in *Vieth*, the "predominant" basis—of the State's redistricting decision. *See* J.S. 23-24.[4] The reason, more fundamentally, is that the type of electoral decision challenged here—a threshold decision to redistrict *at all*—is more readily amenable to judicial scru-

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[4] As used in this brief, "J.S." and "J.S. App." refer to the Jurisdictional Statement and its Appendix in No. 05-276.

tiny than the precise details of where district lines should be drawn once that decision has been made.

For present purposes, "excessive partisanship" challenges to redistricting decisions can be divided into two broad categories. The first consists of challenges to a State's yes-or-no decision to engage in redistricting of any kind. The second consists of challenges to the particulars of whatever new districting scheme a State adopts. We will call these, respectively, "step one" and "step two" challenges.

Most excessive partisanship cases fall in the latter category: they challenge the particulars of the lines drawn rather than the threshold decision to redraw lines. *Vieth* was such a case. The plurality concluded there that step two challenges necessarily elude resolution through judicially manageable rules because the details of district line-drawing are subject to limitless variation and will inevitably reflect a combination of many different considerations, some partisan and some not. *See, e.g.*, 541 U.S. at 290 (plurality opinion) (analysis of excessive-partisanship challenges would "cast[] [courts] forth upon a sea of imponderables"); *see also id.* at 285 (plurality opinion) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide.").

Although the League disagrees with the plurality's conclusion that step two challenges are inherently nonjusticiable, the Court need not revisit that issue here, for this is a step one challenge. What appellants contest is not the State's choice of one among infinitely many districting options, but the State's threshold decision—one of two options in a binary choice—to conduct *any redistricting at all* even though a valid districting scheme was already in place. Appellants claim that the State, by its own admission, made that threshold decision solely to disadvantage a disfavored political association and not for any non-pretextual neutral reason. That claim, which presents none of the line-drawing details present in *Vieth*, is justiciable.

On the merits, appellants argue that partisan gain was the State's only objective in 2003 when it altered the lawful

districting plan adopted by the district court in 2001. As they observe, the district court found in 2004 that "the *single-minded* purpose of the Texas Legislature . . . was to gain partisan advantage" for one party at the expense of another. J.S. App. 85a. In particular, "[t]he newly dominant Republicans . . . decided to redraw the state's congressional districts *solely* for the purpose of seizing between five and seven seats from Democratic incumbents." *Id.* at 88a-89a (emphasis added and alteration in original). Appellants further argue (J.S. 25-26) that this decision to maximize Republican gains in 2003 cannot be justified as a neutral attempt to undo an unlawful Democratic gerrymander in 1991. *Cf.* J.S. App. 20a-22a. They note that the intervening 2001 plan began, in the words of the district court itself, with "a blank map of Texas" (*id.* at 206a), produced a scheme that, as time eroded the influence of incumbency, was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state" (*id.* at 209a), and "reflected the growing strength of the Republican Party in Texas, with 20 of 32 seats offering a Republican advantage" (*id.* at 85a). In any event, whether or not the Court accepts appellants' factual allegations on these points, the allegations themselves plainly establish the justiciability of this case.

B. Appellants' Excessive-Partisanship Claim States A Constitutional Violation

Under any level of equal protection scrutiny, the government must articulate *some* neutral, non-pretextual objective for any decision it makes.[5] Disadvantaging a disfavored

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[5] *See, e.g.*, *Romer* v. *Evans*, 517 U.S. 620, 623 (1996) (equal protection clause "state[s] a commitment to the law's neutrality"); *Lehr* v. *Robertson*, 463 U.S. 248, 265 (1983) ("The concept of equal justice under law requires the State to govern impartially."); *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 (1979) (same); *Kramer* v. *Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627-628 (1969) ("The presumption of constitutionality and the approval given 'rational' classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption,

political group in the electoral process—or favoring a particular political group—is, by definition, not a neutral objective, and standing alone it cannot justify governmental action. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Romer*, 517 U.S. at 634-635 (quoting *Department of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973)) (ellipsis and emphasis in original); *see also Vieth*, 541 U.S. at 316 (Kennedy, J., concurring in the judgment). Indeed, as discussed in Part I, districting decisions that reflect a bare desire to benefit one party to the detriment of another are highly corrosive to our democratic system and, in particular, to the unique constitutional role assigned to the House of Representatives.

That said, the mere fact that some or all legislators harbored a partisan purpose is not enough to invalidate a decision to engage in redistricting. If, in the absence of partisan objectives, a State would have engaged in redistricting anyway for non-pretextual neutral reasons, the fact that the majority party favored redistricting for partisan advancement as well would not necessarily invalidate the redistricting decision at step one. A State might have any number of neutral reasons for deciding to redistrict. For example, a State may need to respond to a new census showing shifts in population or altering the number of representatives. Or the State may need to respond to a court order invalidating the existing plan. In either case, a neutral rationale adequately and independently justifies the threshold decision to engage in redistricting, and that decision would almost certainly survive step one scrutiny.

But partisan considerations do not themselves serve any legitimate state interest and thus cannot by themselves justify a decision to engage in redistricting. Such a decision

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the assumption can no longer serve as the basis for presuming constitutionality." (footnote omitted)).

is therefore invalid if the State would not have made it but for the partisan objective and if, as intended, it harms the disfavored political party.[6] As the *Vieth* plurality recognized, "an excessive injection of politics in redistricting is unlawful." 541 U.S. at 293. And no governmental action can be more "excessively" partisan than one that would not have been undertaken at all but for a desire to favor one political association over another.

As discussed, enforcing the constitutional prohibition on such governmental actions, particularly in the context of a step one challenge, requires no recourse to judicially unmanageable rules. More generally, courts are uniquely competent institutions to adjudicate such matters. "[I]t has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226 (emphasis added). The fact that this dispute involves a challenge to a districting plan makes it, if anything, *more* appropriate for judicial resolution than many types of challenges to substantive legislation unrelated to the electoral process.

"[V]oting cases . . . involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives," with their "obvious vested interest[s]." John Hart Ely, *Democracy and Distrust* 117 (1980). For that reason, it is not only possible, but essential, for the courts to craft judicially manageable rules to police the integrity of the electoral process. With rare exceptions, voters cannot themselves serve as an effective check merely by threatening to unseat incumbents for acting on that incentive. The incumbents can continuously

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[6] *See generally Easley* v. *Cromartie*, 532 U.S. 234, 242 (2001); *cf. Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998) (defendant in mixed-motive employment discrimination case "prevails by showing that it would have reached the same decision in the absence of the protected conduct"); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977) (same).

redraw district boundaries to mitigate that threat, *see Vieth*, 541 U.S. at 364 (Breyer, J., dissenting); few potential challengers within the majority party could credibly promise to disadvantage their party and ultimately their own political prospects by drawing district lines in a more non-partisan manner; and decisions to redistrict will rarely if ever stir voters as much as the substantive political debates of the day. As a result, courts will be the only effective check on partisan abuses in the redistricting process. "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage." Ely, *supra*, at 117.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

LEAGUE OF LATIN AMERICAN CITIZENS, *et al.*,

TRAVIS COUNTY, TEXAS, *et al.*,

EDDIE JACKSON, *et al.*,

GI FORUM OF TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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Interest of *Amicus Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit corporation chartered by the Appellate Division of the New York Supreme Court as a legal aid society. The Legal Defense Fund's first Director-Counsel was Thurgood Marshall. Since its founding in 1939, LDF has been committed to enforcing legal protections against racial discrimination and to securing the constitutional and civil rights of African Americans. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

LDF has an extensive history of participation in efforts to eradicate barriers to the full political participation of African Americans in and to eliminate racial discrimination from the political process. LDF has represented parties or participated as *amicus curiae* in numerous voting rights cases before this Court and the United States Courts of Appeals. *See, e.g.*, *Ga. v. Ashcroft*, 539 U.S. 461 (2003); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991); and *Thornburg v. Gingles*, 478 U.S. 30 (1986). In addition, LDF actively supported the legislative reversal of the decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), which was achieved through the 1982

[1]Letters of consent to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici*, made any monetary contribution to its preparation.

amendments to Section 2 of the Voting Rights Act of 1965. *See* VOTING RIGHTS ACT: HEARINGS ON S. 53, S. 1761, S. 1975, S. 1992 AND H.R. 3112 BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97th Cong., 2d Sess. 1251-68 (1982) (statement of Julius L. Chambers, President of the NAACP Legal Defense and Educational Fund, Inc.).

Because of its longstanding commitment to the elimination of racial discrimination in the political process and the protection of the voting rights of African Americans, LDF has an interest in these appeals, which present important issues concerning the interpretation and application of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

Introduction and Summary of Argument

The four post-2000 Census Texas congressional redistricting cases consolidated before this Court arise from a set of facts that is at once common and extraordinary. The underlying facts are common because they detail a redistricting story in which a partisan majority used its control of the process to extract maximum political advantage. This is unremarkable. Experience teaches that both the Democratic and Republican parties aggressively pursue their partisan motives in redistricting where they can control the process.

The story is extraordinary, however, because the naked partisan objectives of the redistricting process at issue were laid bare by the unusual timing of the line redrawing, and by the means that the proponents employed to achieve their partisan ends. A court-drawn and -approved congressional districting plan fashioned after the 2000 Census, and described as tilting in favor of the Republican party that controls Texas, was deemed not to tilt far enough in an era when computer

innovations have enhanced the possibilities for highly effective gerrymandering. Minority party Democratic legislators fled the state they were elected to serve in an effort to avoid a vote on and passage of the plan that was ultimately passed. Proponents of the "re-redistricting" plan enlisted a federal agency to aid in obtaining the return of the departed state legislators, and longstanding procedural rules of the legislature were nearly abrogated to facilitate passage of the partisan plan.

This set of underlying facts — manifesting familiar redistricting opportunism as well as extraordinary proceedings and techniques — presents this Court for the second time in as many years with the central question whether partisan distortions of the redistricting process can rise to the level of Constitutional injury.

The political aspects of the case have received considerable attention, and any rule(s) that the Court may choose to fashion in service of constitutional guarantees could provide important guidance in establishing the outer bounds to which elected officials may reach in their efforts to place their own, and their parties', interests above those contemplated by the public and Constitutional purposes of redistricting.

Because the cases consolidated before this Court arose in Texas, a state that reflects many of the prevailing demographic patterns and population trends in the United States, there is another — perhaps less discussed but no less important — set of questions that run through the jurisdictional statements. These are questions about minority voting rights and the degree to which contemporary partisan redistricting battles are at tension with well-established legal principles that protect minority citizens' access to the political process and their right to elect candidates of their choice. Not only do partisan manipulations raise questions about the limits of

legislative power exercised in defense of its own interests, but they also threaten to trample principles of minority political fairness elevated by the entire nation in the commands of the 14th and 15th Amendments, and embraced in bipartisan Congressional votes of support for the Voting Rights Act on five occasions. Through these votes, political partisans have themselves recognized that our Constitution and history demand that some rules enjoy a place of primacy in the political process.

Indeed this case raises the specter of an even greater, if less obvious, danger for minority voting rights: If this Court refrains from announcing any limitation on partisan gerrymanders regardless of their severity, and also permits partisan explanations to trump racially disparate voting behavior so as to insulate legislative enactments from judicial scrutiny, the Voting Rights Act, and the minority political fairness principles for which it stands, would become largely meaningless.

Accordingly, LDF submits this brief as *amicus curiae* to address two important issues of interpretation of the Voting Rights Act of 1965, as amended, and construed in the seminal Section 2 case of *Thornburg v. Gingles*, 478 U.S. 30 (1986). These issues, involving (a) the minority numerosity requirement (*Gingles*' first precondition), and (b) the legal significance of partisan alignments along racial lines in negating the significance of racially polarized voting (*Gingles*' third precondition), were the second of the Questions Presented in the jurisdictional statements in Nos. 05-296 and 05-204, respectively.

First, LDF urges this Court to recognize that it is consistent with the language, purposes and evolution of its own doctrine under the Voting Rights Act for minority voters to assert legally cognizable interests in opportunities to elect candidates of their

choice even in districts where those minorities are not sufficiently concentrated to comprise a numerical majority. However, in order for this principle to be both consistent with the statutory purposes of Section 2, and to serve the screening function for which the *Gingles* prerequisites were intended, it must be properly limited to recognize only reliable coalition districts that provide a discernible opportunity for the coalition to elect and not improvidently extended in the Section 2 context to encompass necessarily amorphous influence districts. If this Court agrees with our suggestion and modifies the first *Gingles* prerequisite, the judgment below should be vacated with instructions to reconsider the affected claims and issues in light of the new standard.

Second, if this Court reaches the issue of the interplay between partisan and racially polarized voting patterns under the *Gingles* preconditions, it should find that considerations of partisan polarization may not rebut, and thereby place beyond judicial reach, a *prima facie* showing under the *Gingles* preconditions but may be considered only under the totality of the circumstances.

These legal questions are of considerable moment. More than forty years after passage of the transformative Voting Rights Act, the Court is presented in these appeals with an opportunity to revisit its seminal Section 2 decision, as well as to reconcile partisan redistricting issues, recently considered in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), that are bound up in, but not fully coextensive with, the minority political fairness principles to which Congress has consistently committed our nation. That these issues are now intertwined is no reason to abandon Constitutional and Congressional mandates. Indeed, the political and minority voter protection issues have always been intertwined.

ARGUMENT

I.

Districts In Which Voters Of A Particular Minority Group Do Not Constitute 50% Of The Relevant Population, But Who Are Able To Elect Candidates Of Their Choice In Combination With Other Minority Voters, Or With Reliable Crossover Votes From The Population Majority, Meet The First *Gingles* Precondition For A Viable Section 2 Claim

Jackson Appellants (plaintiffs below) urge the Court to extend the protections of Section 2 of the Voting Rights Act to districts in which a substantially large group of minority voters — while short of comprising a mathematical majority of the population — is nonetheless capable of nominating and electing its candidate of choice. Before the District Court, other plaintiffs requested recognition of a § 2 claim not only for so-called "coalition" or "crossover districts," but also for "influence districts," where minority voters, while unable to elect their candidates of choice, exercise varying levels of influence in the electoral process.[2] *Session v. Perry*, 298 F.

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[2]There has been some confusion among commentators litigants, and courts — including the District Court below, *see, e.g., Session*, 298 F. Supp. 2d at 482-83 (identifying various proffered examples of influence and coalition districts) — over what constitutes an "influence," "coalition," or "crossover" district. For purposes of this brief, we consider an "influence district" one "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." *Ga. v. Ashcroft*, 539 U.S. 461, 482 (2003). A "coalitional" or "crossover district" is one in which (as the Court has described it), minority voters in a district — despite

Supp. 2d 451, 482-83 (E.D. Tex. 2004).[3]

The District Court, following the Fifth Circuit's strict "fifty percent rule," rejected these arguments. *Id.* at 482-83 & nn.111, 112 (citing *Perez v. Pasadena Independent Sch. Dist.*, 165 F.3d 368 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000); *Valdespino v. Alamo Heights Ind. Sch. Dist.*, 168 F.3d 848 (5th Cir. 1999), *cert. denied*, 528 U.S. 1114 (2000)). In so doing, it declined the opportunity to decide whether *any* set of circumstances might exist in which a group of minority voters less than an absolute majority of the relevant population could ever satisfy the first *Gingles* precondition. *Id.* at 476.

This Court has yet to rule on the question. *See, e.g.*, *Johnson v. DeGrandy*, 478 U.S. at 1008-09; *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993); *Growe v. Emison*, 507 U.S. 25, 41 (1993); *Gingles*, 478 U.S. at 47 n.12; *see also Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (*en banc*) ("[S]everal Supreme Court opinions after *Gingles* have offered the prospect, or at least clearly reserved the possibility, that *Gingles*' first precondition — that a racial minority must be

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their not constituting a majority of the population — can form a coalition with another minority group sufficient to elect their candidate of choice, *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994), or can demonstrate an ability to elect their candidate of choice "when joined by *predictably* supportive nonminority voters." *Ga. v. Ashcroft*, 539 U.S. at 492 (Souter, J., dissenting) (emphasis added).

[3]This was the lower court's opinion supporting the judgment that was vacated and remanded in *Jackson v. Perry*, 160 L. Ed. 2d 252 (2004); the issues addressed by *amicus* in this brief were discussed by the court only in that opinion, and not in its June 9, 2005 remand opinion (reprinted at J.S. App. 1a-50a in No. 05-204).

able to constitute a 'majority' in a single-member district — could extend to a group that was a numerical minority but had predictable cross-over support from other groups.") (citing cases).

LDF writes separately as an *amicus* to urge the Court to interpret the first *Gingles* requirement, consistent with the text and purpose of the Voting Rights Act, to include those districts in which a minority group can demonstrate an "ability to elect" — even if it does not comprise a mathematical majority of the population. Such a limited extension of the first *Gingles* precondition would demonstrate a recognition of the political realities of the American electoral process and is fully consistent with the evolution of the Court's Section 2 jurisprudence. The Court should not, however, extend coverage of Section 2 to include claims in which a minority group alleges that it can exercise some amorphous degree of "influence" over elections or governance, as doing so would establish a new standard that is both unworkable and ungrounded in either the statute or the relevant case law.

A. Recognizing "Crossover" or "Coalition" Districts under Section 2 Is Consistent with the Statutory Language, Structure and Intent, and also with This Court's Voting Rights Act Jurisprudence.

Because the language of Section 2 explicitly protects the ability of minority voters to "*elect representatives of their choice*," 42 U.S.C. § 1973(b) (emphasis added), the focus of the Section 2 inquiry at the precondition stage should be whether the specific conditions in a jurisdiction permit the fact-finder to conclude that a minority group in a given district does in fact have a reliable opportunity to elect its candidates of choice. *See Gingles*, 478 U.S. at 43-46 (describing legislative history and purpose of the Act). The pertinent difference

between "coalition" or "crossover districts," on the one hand, and "influence districts," on the other, is that the former districts involve instances in which there is a cognizable "ability to elect" claim.

The Court should not interpret the *Gingles* preconditions so strictly as to frustrate this clear statutory purpose. The *Gingles* test was fashioned in order to make sure that a cognizable Section 2 claim (and remedy) exists, especially given that the statute expressly disavows any guarantee of proportional representation. *Gingles*, 478 U.S. at 50 & n.17 (purpose of first precondition designed so that Section 2 would "only protect racial minority votes from diminution proximately caused by the districting plan; *it would not assure racial minorities proportional representation.*") (emphasis in original) (internal citations omitted). Thus, *Gingles* viewed the first precondition as a means to ensure that courts would consider Section 2 claims in jurisdictions where "minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice," 478 U.S. at 50 (emphasis in original), and the precondition should be understood to serve a functional — not inflexible — purpose. *Growe*, 507 U.S. at 40 ("[T]he 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.")

Nor is there a practical reason to limit the protections of Section 2 to majority-minority communities. There is nothing talismanic about a district with a (single or combined) minority population greater than fifty percent. Both the *Gingles* preconditions and Section 2 itself were designed to provide practical measures for realizing the ability of minority voters to

elect candidates of choice.[4] The degree of racial polarization will drive what level of minority population is necessary and the analysis can vary even within a single state, or jurisdiction.

The *Gingles* Court itself recognized that some white crossover voting may exist and should be considered in the fact-intensive analysis of whether a Section 2 claim could be established. 478 U.S. at 56 ("And, in general, a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover' votes* rises to the level of legally significant white bloc voting. . . . The amount of white bloc voting that can generally 'minimize or cancel' . . . black voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors.") (emphasis added) (internal citations omitted).

Similarly, several lower courts — including the Fifth Circuit — have expressly recognized that minority coalitions among groups that each may not meet the first *Gingles* prerequisite can be considered together to satisfy its requirement, at least if they can establish that voters of both

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[4]Indeed, in the early years of Section 2 enforcement, courts routinely required supermajorities to guarantee the minority voters' ability to elect. *See, e.g., Ketchum v. Byrne*, 740 F.2d 1398, 1413-17 (7th Cir. 1984) (collecting cases). Just as it is possible that minority voters who constitute a bare majority of the population a district may fail to demonstrate that they have the ability to elect candidates of their choice, it is also theoretically possible that minority voters who are *less* than a majority of a district *can* make such a showing. *See Gingles*, 478 U.S. at 56 n.24 and accompanying text. Courts should be free to continue to take into account the changing landscape of American politics and the development of minority coalitions or the phenomenon of limited white crossover voting where it exists.

groups vote together cohesively. *See, e.g.*, *Campos v. City of Baytown, Texas*, 840 F.2d 1240, 1244-46 (5th Cir. 1988) (affirming trial court finding of cohesion and applying principle), *cert. denied*, 492 U.S. 905 (1989); *League of United Latin American Citizens v. Midland Ind. Sch. Dist.*, 812 F.2d 1494, 1500-02 (5th Cir.) (same), *vacated and aff'd on other grounds*, 829 F.2d 546 (5th Cir. 1987); *see also Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526-27 (11th Cir. 1990) (recognizing principle but affirming trial court's determination that cohesion between groups not proved); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (same).

This Court has not decided the question. However, in *Ga. v. Ashcroft*, all of the Justices recognized the relevance of coalition and crossover districts in assessing whether retrogression under Section 5 occurred in districts where minority voters were provided an opportunity to elect their candidates of choice under the benchmark plan. *See* 539 U.S. at 480 ("[A] State may choose to create a greater number of districts in which it is likely — although perhaps not quite as likely as under the benchmark plan — that minority voters will be able to elect candidates of their choice."); *id.* at 492 (Souter, J., dissenting) ("The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by *predictably* supportive nonminority voters.") (emphasis added).

Although pervasive racially polarized voting patterns continue to dominate the political landscape, *see, e.g.*, Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 VAND. L. REV. 291 (1997); Samuel Issacharoff, *Polarized Voting and the Political Process: The*

Transformation of Voting Rights Jurisprudence, 90 MICH. L. REV. 1833 (1992), there are (and have long been) some communities in which minority-preferred candidates enjoy limited, reliable white crossover support or in which minority voters have formed sufficiently large and dependably cohesive coalitions with other racial or ethnic minorities to elect a candidate of their choice. *See, e.g.*, Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. REV. 1383, 1394-1423 (2001) (empirical analyses of election results in certain communities where black voters were able to elect candidates of choice despite not comprising a majority of the districts' respective populations).

In its rulings since *Gingles*, the Court has recognized the phenomenon that there are some communities in which coalitions are formed among minority groups or small, reliable levels of crossover voting from white voters that provide certain minorities, who themselves may not comprise a majority of the voting population, with a reasonable opportunity to elect their candidates of choice. *See, e.g.*, *Ga. v. Ashcroft*, 539 U.S. at 480; *DeGrandy*, 512 U.S. at 1023.[5]

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[5]It bears emphasis that whether a court will find reliable, predictable majority crossover voting of sufficient size to allow the election of minority voters' candidates of choice will depend on the nature and extent of the proof offered by Section 2 claimants. The inquiry is similar in nature to that described by Justice Brennan in *Gingles* with respect to determining whether white bloc voting would "generally 'minimize or cancel,' . . . black voters' ability to elect representatives of their choice," and "will vary from district to district according to a number of factors." *See Gingles*, 478 U.S. at 56, text at n.24 (setting out non-exclusive list of potentially relevant factors).

To be sure, it will continue to be true that for most Section 2 claims, having a majority of minority voters will be necessary to demonstrate an "ability to elect." But, the existence of crossover and coalition districts where the opportunity to elect candidates of choice is available to minority voters should be embraced and protected by the Court's Section 2 jurisprudence, not held in check based on an unnecessarily restrictive interpretation of its judicially-crafted test. *DeGrandy*, 512 U.S. at 1020 (describing the Voting Rights Act as "a statute meant to hasten the waning of racism in American politics"). Requiring minority voters to show that they are an absolute majority ignores the practical reality that, in some jurisdictions, they are capable of electing preferred candidates without such numbers. It also places an artificial limitation on the effectiveness of Section 2 by failing to allow it to account for shifts in the political landscape. *See Voinovich*, 507 U.S. at 158 ("[T]he *Gingles* factors cannot be applied mechanically without regard to the nature of the claim.").

Indeed, in *DeGrandy*, this Court expressly rejected the State's safe harbor argument on the grounds that relying too heavily on majority-minority districts as the only way in which minorities may enjoy equal electoral opportunity would "obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." 512 U.S. at 1020.

B. Section 2 Claims Involving "Coalition" or "Crossover" Districts Are Governed by Manageable Standards Already Familiar to Federal Courts from Past Section 2 Litigation.

Relaxing the first *Gingles* precondition of the Section 2 inquiry to permit a more exacting focus on minority voters' "ability to elect" in a coalition or crossover district only brings it closer in line with the text of the statute, which codified the "totality of the circumstances" analysis from *White v. Regester*, 412 U.S. 755 (1973), and the intent of Congress, which was to take account of the contemporary, practical realities of the political process. *See Gingles*, 478 U.S. at 45 (noting that the Senate Committee recognized that "the question whether the political processes are 'equally open' depends on a searching practical evaluation of the 'past and present reality,' . . . and on a 'functional' view of the political process.") (some internal quotations and citations omitted). *See also Ga. v. Ashcroft*, 539 U.S. at 480 ("The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine.").

This more practical application of the first *Gingles* precondition recognizing districts that may not have a numerical majority of minority voters would not open the door to claims that Congress never intended to protect in Section 2, since proof of the other two *Gingles* preconditions would remain necessary. *See Ga. v. Ashcroft*, 539 U.S. at 485 ("And it is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district."). The other two *Gingles* prongs, along with other "totality of the circumstances" considerations, will assist courts in determining if a given

district provides minority voters with an "ability to elect" as opposed to merely the "ability to influence."[6]

Indeed, the determination of an "ability to elect" in coalition or crossover districts is one that even the dissenting Justices in *Ga. v. Ashcroft* acknowledge is concrete and demonstrable, 539 U.S. at 492 (Souter, J., dissenting), not an abstract hope too elusive to for courts to establish limiting principles, as is the case with the recognition of influence districts. *Id.* at 496-97 (but noting difficulties of quantifying "influence").

While it is true that the Court's recent decision in *Ga. v. Ashcroft* held that influence districts could be considered in a § 5 retrogression analysis, the recognition of influence districts in that context should not extend to Section 2. *Ga. v. Ashcroft*, 539 U.S. at 478 ("We have, however, 'consistently understood' § 2 to "combat different evils and, accordingly, to impose very different duties upon the States.") (quoting *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997)). *See also Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion) (Sections 2 and 5 are "different in structure, purpose, and application"). Indeed, as the Court in *Ga. v. Ashcroft* noted, "[i]n contrast to § 5's retrogression standard, the 'essence' of a § 2 vote dilution claim is that 'a certain electoral law, practice, or structure . . .

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[6]For example, a minority group could require so many crossover votes that it does not truly possess the capacity to choose its own candidate, but only to influence electoral contests between two or more white-preferred candidates. Similarly, a minority group that is too small and that thus requires too high a level of white crossover support will be unlikely to satisfy the third *Gingles* precondition: that white regularly vote as a bloc against the minority preferred candidate. A careful analysis of election data, therefore, will shed light on which role minority voters actually play in the political process.

cause[s] an inequality in the opportunities enjoyed by black [or other minority voters] and white voters *to elect their preferred representatives*.'" *Id.* (quoting *Gingles*, 478 U.S. at 47) (emphasis added).

Just as the text of Section 2 provides the basis for a more flexible interpretation of the first *Gingles* precondition, therefore, it also provides a built-in limiting principle: the requirement that minorities in an existing or proposed district demonstrate an ability to elect "representatives of their choice." 42 U.S.C. § 1973(b). Whereas the parameters of a Section 5 retrogression determination find their origins in this Court's jurisprudence, *see Beer v. United States*, 423 U.S. 130, 141 (1976), the statutory language about the minority group's "ability to elect" is the touchstone of any Section 2 analysis.

The court below erred in ending its Section 2 analysis when it found that African-American voters in District 24 were unable to meet the majority-minority requirement of the first *Gingles* precondition. *Sessions*, 298 F. Supp. 2d at 483 ("A minority group lacking a majority cannot elect its candidate of choice, and denying the group a separate district cannot be a denial of any opportunity protected by the [Voting Rights] Act."). Its singular focus on the numerical aspect of the *Gingles* test was unwarranted and turned its attention away from the relevant "ability to elect" question.

This Court should clarify its ruling in *Gingles*, remand the case to the District Court to determine, under the totality of the circumstances, whether District 24 provides minority voters an opportunity to elect their candidate of choice. Among other circumstances, the lower court should seek to determine the degree of racial polarized voting with special focus given to whether the district provides the minority voters with the opportunity to elect candidates of choice.

II.

Whatever Limitations, If Any, The Court Places Upon Political Gerrymanders, It Is Essential That They, Like Other Redistrictings, Remain Subject To Meaningful Scrutiny Under Section 2

In the last two decades, developments in computer technology and software programming have made possible increasingly sophisticated and precise shaping of districts for political, among other, ends, and this Court's attention has been correspondingly drawn to the question whether the Constitution places any limits upon partisan gerrymandering. These appeals grow out of cases filed to challenge one such redistricting.

Some plaintiffs in those cases alleged that the 2003 districting plan at issue, even if it were drawn for partisan ends, also infringed upon minority voting rights protections afforded by Section 2 of the Voting Rights Act. The court below rejected those claims on the ground, *inter alia*, that their proponents could not satisfy the first *Gingles* precondition. See *supra* § I. However, the court also indicated in its decision that even were this not its view, it would have rejected the claims by applying a doctrine developed by the Fifth Circuit more than a dozen years ago, which holds that neither the second nor the third *Gingles* preconditions (cohesion and racially polarized voting) can be established where party affiliation is also characterized by substantial racial differences. *Session*, 298 F. Supp. 2d at 478 n.88.

Such an approach would effectively eliminate the application of Section 2 to redistricting plans in areas where political party loyalties have split along racial or ethnic lines, which has become common in our nation at this point in its

history. That result is insupportable as a matter of the statutory text or Congressional purposes underlying enactment and amendment of Section 2 of the Voting Rights Act. It would be especially unfortunate if this Court were to sanction it, directly or implicitly. Rather, the Court should make clear in its decision on these appeals that the Fifth Circuit's approach is inconsistent with the Act.

A. The Doctrine that Racial Cleavages in Political Party Affiliation Negate the Significance Under Section 2 of Racial Voting Patterns Misconstrues this Court's Section 2 Jurisprudence.

For twenty years, racially polarized voting patterns have been at the core of this Court's Voting Rights Act jurisprudence. *See, e.g., Gingles,* 478 U.S. 30. The analysis of racially polarized voting is a very apt analytical tool because it aids in identifying the circumstances in which private behavior combines with structural electoral arrangements to impede equal opportunities for minorities to elect candidates of choice and participate in the political process. *See id.* at 51. Under Section 2, two of the three *Gingles* preconditions involve variants of bloc voting. The standard is in many respects self-regulating. If a substantial degree of polarization is present, assuming other threshold conditions are met, the analysis proceeds, whereas a failure to show legally significant polarization ends the inquiry.

Since this Court decided *Gingles*, the preconditions have played an essential gate-keeping function for courts by allowing them to approach Section 2 claims with a discernible standard. As the designation suggests, meeting the preconditions does not suffice for purposes of the ultimate liability determination under Section 2 — that determination is made only under the totality of the circumstances, including consideration of the

"Senate factors." *Id.* at 36-37. Accordingly, in the area of minority voting rights protection, Congress has identified a problem, provided a remedy, and this Court has supplied, and at times refined, a judicially manageable standard.

Racially polarized voting patterns are the touchstone of Section 2 claims. In *Gingles,* the Court addressed the question whether the Section 2 dilution inquiry concerns itself exclusively with the existence of polarized voting patterns or also with the reasons that such patterns occurred. Writing for the Court, Justice Brennan explained that:

> It is the *difference* between the choices made between blacks and whites – not the reasons for that difference – that results in blacks having less opportunity than whites to elect preferred representatives. Consequently, we conclude that under the "results test" of Section 2, only the correlation between the race of the voter and selection of certain candidates, not the causes of the correlation matters.

Id. at 64 (emphasis in original).

All Justices accepted the principle announced by this portion of Justice Brennan's plurality opinion, at least insofar as it applied to the preconditions to bringing a Section 2 claim. *See Gingles,* 478 U.S. at 100 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring in the judgment):

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other

> than race, such as the underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the overall vote dilution inquiry.

(Justice White did not join this part of Justice Brennan's opinion only insofar as it would not have permitted consideration of the race of the candidate, as well as the race of the voter, in the "totality of the circumstances" analysis. *Gingles*, 478 U.S. at 83.)

Notwithstanding this functional agreement that the *Gingles* preconditions do not end the dilution analysis but rather operate to narrow the number of cases that require further Section 2 consideration under the totality of the circumstances, the Fifth Circuit has adopted an inconsistent rule which permits the very type of "rebuttal evidence" disfavored by the Court. *See League of Latin American Citizens v. Clements*, 999 F.2d 831, 850, 858-59 (5th Cir. 1993) (*en banc*) (*LULAC*), *cert. denied*, 510 U.S. 1071 (1994). Although the *LULAC* court insisted on an evaluation of the role of partisan causation as an explanation for polarized voting patterns with all of the attendant problems of that approach, *see, e.g.*, Bernard Grofman & Lisa Handley, *Issues in Voting Rights*, 65 MISS. L.J. 205, 222-34 (1995); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 CAL. L. REV. 1201, 1223-27 (1996), it did not clearly explain how its newly announced rule of Section 2 analysis would operate. *LULAC*, 999 F.2d at 860 (". . . we need not resolve the debate today. Whether or not the burden of the plaintiffs to prove bloc voting includes the burden to explain [that is, to negate the role of] partisan influence, the result is the same.")

The *LULAC* rule has both doctrinal and evidentiary shortcomings. As a legal matter, it introduces partisan

intent/causation into the proof requirements of a statute that was expressly amended by Congress to establish a results test in order to make proof of intent unnecessary. *See Gingles*, 478 U.S. at 35-37 (summarizing history). As an evidentiary and empirical matter the problem is two-fold:

First, there is sufficient correlation between partisanship and racial bloc voting patterns in so many parts of the country that the two are at best complicated, or in some cases impossible to disentangle. *See, e.g.*, Grofman & Handley, 65 MISS. L.J. at 229 (". . . separating out racial from partisan concerns will not be easy, and forcing plaintiffs to try to do so in order to succeed in proving a Section 2 violation in situations involving partisan elections will make it much harder for plaintiffs to prevail in such challenges, even in situations where minority exclusion [is] total"); Karlan & Levinson, 84 CAL. L. REV. at 1223-24 (noting shortcomings of statistical models that attempt to disaggregate race and partisanship); Richard L. Engstrom, *The Reincarnation of the Intent Standard: Federal Judges and At-Large Election Cases*, 28 HOW. L.J. 495, 506 (1985) (criticizing attempts by courts to "cleanse" racially divided voting patterns of their racial content through multivariate analysis); *cf. Vieth v. Jubelirer*, 541 U.S. at 287 (Scalia, J.) ("But a person's politics is rarely as readily discernible — and *never* as permanently discernible as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.").

Second, the introduction of partisan causation in the initial precondition stage of the *Gingles* analysis transforms a judicially manageable standard for political fairness to minority voters into a judicially created barrier to the congressionally authorized method of relief.

In a footnote, the court below appears to extend the Fifth Circuit's polarized voting causation rule. *Session*, 298 F. Supp. 2d at 478 n.88. Contrary to *Gingles* and its progeny, the court announces that its newly devised test requires that at the *Gingles* preconditions stage, plaintiffs bear the burden of *disproving* what amounts to a presumption of partisan causation. *Id.*[7] Placing this affirmative burden on plaintiffs at the threshold stage transforms partisanship from one factor among others to be taken into account in the "totality of the circumstances" analysis into an outcome-determinative issue, despite the facts that: *(a)* it is not mentioned in the statute; and, *(b)* all members of the Court in *Gingles* accepted the proposition that the issue was relevant only at the final "totality" stage of the case, except for three Justices who would have excluded its consideration even at that stage.

The Fifth Circuit's particularly muscular version of partisan polarization presumption is also anomalous among lower federal courts. Although several Circuits recognize that it is proper to consider explanations for voting patterns under

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[7] *Cf. Johnson v. Cal.*, 162 L. Ed. 2d 129, 139 (2005) ("[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred. Respondent, however, . . . contends [that] a *Batson* claim must prove the ultimate facts by a preponderance of the evidence in the prima facie case . . . . Respondent's argument is misguided. . . . 'It is not until the *third* step that the persuasiveness of the justification becomes relevant — the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.' *Purkett* [*v. Elem*, 514 U.S. 765] at 768.") Since Section 2 was amended in 1982 to eliminate any requirement of proving intent, placing the burden on plaintiffs to disprove a presumed nondiscriminatory explanation for racially polarized voting patterns is even more insupportable.

the totality of the circumstances, consistent with Justice O'Connor's opinion in *Gingles*, the Fifth Circuit appears to stand alone in its requirement that partisan causation be presumed to explain racially polarized in voting patterns. *See e.g., United States v. Charleston County*, 365 F.3d 341, 348-49 (4th Cir. 2004); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995).

B. The Fifth Circuit's Partisanship Exception to the Second and Third *Gingles* Preconditions Ignores the Extent to which Race Has Become Implicated in Partisan Alignment.

Apart from the doctrinal and evidentiary problems with the *Session* variant of the partisan polarization presumption in the Section 2 analysis, the rule ignores the extent to which today's political parties have been shaped by express or implicit racial considerations and appeals. Faced with an entrenched and well-documented history of discrimination in voting with discernible present day effects, Congress has determined on several occasions that the best way to enhance minority political inclusion is to take account of and try to ameliorate racial cleavages rather than seeking to explain them away.

The contemporary party alignments happened over time, but they cannot be said to be sufficiently different in nature from the trend that began prior to the passage of the Voting Rights Act to justify a prophylactic rule that places them beyond the reach of courts. *See* Grofman & Handley, 65 Miss. L.J. at 229 (explaining that Blacks have been overwhelmingly Democratic in their party affiliation since 1964, and whites have become increasingly Republican).[8] The contemporary

[8] In *Gingles*, 478 U.S. at 40, this Court acknowledged the record evidence of the use of race to divide the electorate for

partisan trends emerged in a context that scholars and political operatives both recognize. *See* Karlan & Levinson, 84 CAL. L. REV. at 1223 (citing Thomas B. Edsall & Mary D. Edsall, CHAIN REACTION; THE IMPACT OF RACE RIGHTS, AND TAXES ON AMERICAN POLITICS, at 151 (1991) (arguing that racial attitudes after the 1960s "became a central characteristic of both ideology and party identification, integral to voters' choices between Democrats and Republicans").

Indeed, even political partisans, at times, express a willingness to acknowledge the role that race has played in the prevailing political alignment. As the *Washington Post* recently reported, in a prepared speech delivered to the NAACP during its national conference in July of 2005, Republican National Committee Chairman, Ken Mehlman, apologized for "the southern strategy," which the paper described as "Republican efforts to use race as a wedge issue on matters such as desegregation and busing — to appeal to white southern voters." Mike Allen, *RNC Chief to Say It Was 'Wrong' to Exploit Racial Conflict for Votes,* WASHINGTON POST, July 14 2005, at A4. "By the '70s and into the 80s and

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nearly a century, continuing beyond the date of the last Voting Rights Act renewal:

> [T]he [district] court found that white candidates in North Carolina have encouraged voting along color lines by appealing to racial prejudice. It noted that the record is replete with specific examples of racial appeals, ranging in style from overt and blatant to subtle and furtive, and in date from the 1890's to the 1984 campaign for a seat in the United States Senate. The court determined that the use of racial appeals in political campaigns in North Carolina persists to the present day and that its current effect is to lessen to some degree the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice.

90s, the Democratic Party solidified its gains in the African American community, and we Republicans did not effectively reach out . . . . Some Republicans gave up on winning the African American vote, looking the other way or trying to benefit politically from racial polarization. I am here today as the Republican Chairman to tell you we were wrong." *Id.*

Nor is the history of the Democratic Party without substantial racial strife. *See* Mary Frances Berry & John W. Blassingame, LONG MEMORY; THE BLACK EXPERIENCE IN AMERICA 385 (1982) (detailing the exclusion of the integrated Mississippi Freedom Democratic Party from the party's national convention in 1964); Paul Frymer, UNEASY ALLIANCES; RACE AND PARTY COMPETITION IN AMERICA 3-7 (1999) (detailing the neglect of African-American interests by the modern Democratic party). Indeed, Frymer observes more broadly that "[a]t most moments in American history, the desire of political parties to seek national office has meant marginalization for African Americans . . . . We are . . . one of few democratic nations where party leaders have an incentive to appeal almost exclusively to the majority group." *Id.* at 6.

In light of this history, whether desirable or not, it seems particularly incongruous for a court to begin its analysis of a congressionally mandated minority voting protection and political fairness measure with the presumption that racial patterns of partisan affiliation negate the significance of persistent racial polarization at the ballot box. A rule whose expansion has the potential to allow political parties to "benefit politically from racial polarization" rather than ameliorating it is unwarranted.

C. Whether or Not It Holds that There Are Constitutional Limits to Partisan Gerrymandering in the Redistricting Process, the Court Should Explicitly Disapprove the Fifth Circuit's Unique Partisanship Exception to Section 2.

For the reasons we have described above, politics in the United States is now substantially intertwined with race and ethnicity, and correspondingly, partisan gerrymandering may dramatically impact minority voting strength, as the highly partisan redistricting plan at issue in these appeals demonstrates. With support from Members of both major political parties, Congress has exercised its constitutional authority to place minority voting rights above partisan political interests through the passage and renewal of the Voting Rights Act.[9]

If this court allows the continued application of a rule that racial or ethnic polarization in partisan alignment negates the existence of the *Gingles* preconditions of cohesive minority voting and racially polarized voting, it will place minority voters beyond the reach of Section 2 protections. This result is contrary to the language and purposes of the Voting Rights Act and this Court should expressly disapprove it in these appeals, whether or not it fashions limitations on partisan gerrymanders.

The need for the Court explicitly to address the *LULAC* rule is especially critical if the result of its renewed deliberations on partisan gerrymandering places no substantial limitations upon that device, as party organizations can be

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[9] *Cf. Vieth*, 541 U.S. at 275 (discussing Congress' authority over Congressional districting pursuant to Art. I, Sec. 4 of the Constitution and noting the failure to exercise that authority in recent history to limit partisan gerrymandering).

expected to maximize political advantage in this fashion to the greatest extent allowable by the law.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully suggests that the judgment below should be vacated and the case remanded for reconsideration in light of the clarified *Gingles* standards urged in this brief.

Respectfully submitted,

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In The
Supreme Court of the United States

LEAGUE OF UNITED
LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICI CURIAE* THE REFORM INSTITUTE, THOMAS MANN, AND NORMAN ORNSTEIN IN SUPPORT OF APPELLANTS

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INTEREST OF *AMICI CURIAE*[1]

The Reform Institute, Inc. is a not-for-profit 501(c)(3) educational organization representing a thoughtful voice of reform in debates over campaign finance and election administration. Former Congressman Amo Houghton serves as Chair of the Board. The Reform Institute has three main roles: (1) to reduce political corruption and the appearance of corruption; (2) to promote discussion about how best to reform election registration and voting procedures in order to increase meaningful citizen participation in the democratic system; and (3) to promote and defend citizen reform initiatives that seek to open the doors of the voting process. The present case concerns whether a state legislature can redraw congressional districts so as to minimize the likelihood that a particular political party's candidates will win in the election. It directly implicates the Reform Institute's second role of increasing meaningful citizen participation in the democratic system.

Thomas E. Mann and Norman J. Ornstein are political scientists at the Brookings Institution and the American Enterprise Institute, respectively. In their 35-year careers, they have individually and jointly written extensively about Congress, elections, redistricting and American politics and government generally. Active in congressional, election, campaign finance, and other institutional reform efforts, their professional lives have

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[1] *Amici Curiae* certify that no counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court.

been focused on the health and vibrancy of American political institutions. Their biennial book Vital Statistics on Congress is in its twelfth edition. Their newest book, The Broken Branch, will be published by Oxford University Press in June 2006. Their joint AEI/Brookings efforts have included the Renewing Congress Project, Five Ideas for Practical Campaign Reform, the Transition to Governing Project, the Alternatives to the Independent Counsel Project, the Continuity of Government Commission, and the Election Reform Project. Mann is co-editor of Party Lines: Competition, Partisanship, and Congressional Redistricting, recently published by Brookings.

SUMMARY OF ARGUMENT

The Framers envisioned the House of Representatives as a unique structure of the national government. Unlike the Senate, the President, or the courts, it was to have "an immediate dependence on, and an intimate sympathy with, the people." The Federalist No. 52, at 337 (James Madison) (Robert Scigliano ed., 2001). As John Adams put it, the body of the people's representatives should "be in miniatur[e] an exact portrait of the people at large. It should think, feel, reason, and act like them." John Adams, *Thoughts on Governance*, *in* 4 Papers of John Adams 87 (Robert J. Taylor ed., 1977). With this in mind, the Framers carefully designed the House to "bin[d] the representatives to their constituents . . . [and] to extend the influence of the people over their representatives." The Federalist No. 52, at 339. They insisted on direct election "by the People of the several States," a broad franchise, regular reapportionment as among the states, and frequent elections. U.S. Const. art. I, § 2. Of these, the last was the

most important, for "without the restraint of frequent elections" in the House, the Framers thought, "[a]ll [other] securities [against oligarchy] would be found very insufficient. . . ." The Federalist No. 57, at 367. By this device

> the House of Representatives is so constituted to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed, and when they must descend to the level from which they were raised; there forever to remain unless a faithful discharge of their trust shall have established their title to a renewal of it.

Id. Nearly every special feature of the House's design was meant to ensure that it, unlike the other primary structures of the federal government, was highly responsive to public sentiment.

Unfortunately, congressional redistricting has defeated much of the Framers' vision and intercensal redistricting threatens it even further. High rates of incumbent reelection, declining competitiveness of congressional districts, and long periods of one-party control of the House have eroded the accountability and legitimacy of the people's chamber. The 2002 congressional elections make this point starkly. Only four challengers defeated House incumbents – the lowest number in modern American history. Michael J. Dubin, United States Congressional Elections, 1788-1997: The Official Results (1988); Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional*

Redistricting, 2 Election L.J. 179, 182 (2003). Only 43 House incumbents, moreover, won reelection "narrowly" – defined generously as by less than 60 percent of the vote – while 338 House incumbents enjoyed very large victory margins – 20 percent or more – including 78 who ran unopposed by a major party challenger. *Id.* at 183 & tbl. 1; *see* Michael Barone & Richard E. Cohen, The Almanac of American Politics 2006 (Nat'l J. Group 2006) (providing underlying information on each House race for computation of number of incumbents running unopposed by major party challengers). In the nation's largest state, California, not a single challenger in the general election received as much as 40 percent of the vote. Hirsch, *supra*, at 182. And more than a third of all States sent to Congress *exactly* the same House delegation as before. *Id.*

These facts are particularly striking because the 2002 elections were the first held after the latest reapportionment. Historically, incumbents suffer in such elections. As their old voters disappear and new voters replace them, incumbents usually find their seats less secure. Their new voters can have quite different interests than their previous constituents. From 1972 to 1992, in fact, House turnover averaged 45 percent higher in immediate post-reapportionment Congresses. These Congresses contained an average of 87 freshmen, while the others in this period contained only 60. *Id.* at 183. In 2002, however, only 53 freshmen were elected to the House – less than half the number elected in 1992. *See* Norman J. Ornstein, Thomas E. Mann & Michael J. Malbin, Vital Statistics on Congress 2005-2006 at tbl. 2-7 (Nat'l J. Group forthcoming 2006) (calculated by subtracting number of incumbents reelected listed in sixth column from 435, the overall number of representatives). In 2002, incumbents had a very easy ride

overall. Only 35 incumbents retired (rather than the average of 48 in other recent post-reapportionment Congresses); only eight lost in the primaries and only eight lost in the general election, in each case half the time to another incumbent. *Id.* This lack of competition was, moreover, peculiar to the people's chamber. On the same day that less than ten percent of House races were being decided by margins of ten percent or less, nearly half of all gubernatorial and U.S. Senate races were that close. Hirsch, *supra*, at 183. One significant difference, of course, is that no one can gerrymander a statewide district.

The 2004 elections were hardly better. Only seven out of the 402 incumbents seeking reelection were defeated and four of these were victims of the partisan-motivated, intercensal gerrymander in Texas. Gary C. Jacobson, *Polarized Politics and the 2004 Congressional and Presidential Elections*, 120 Pol. Sci. Q. 199, 199 (2005) (hereinafter "*Polarized Politics*"). Without the one-time Texas gerrymander, in fact, only eight House seats would have changed party, an all-time low. *Id.* at 200. The Texas intercensal redistricting had two primary effects. First, it meant that Republicans gained rather than lost House seats in the nation overall. *Id.* at 201. The plan, which was designed to eliminate seven incumbent Democrats, led to one targeted incumbent changing parties, one retiring, four losing in the general election, and only one surviving. *Id.* at 201-02. Second, it further shored up each congressional district in the state for one party or the other. Of the 22 districts where incumbents ran with an underlying partisan majority, the incumbent's average share of the two-party vote was 75 percent. App. to Juris. Statement of Eddie Jackson 225a. Revisiting the post-census redistricting thus allowed the state to radically change the partisan

complexion of its House delegation while maintaining a low level of interparty competition within districts. In order to promote a Republican majority, the intercensal redistricting had to create populations of voters safe for one party or the other in as many districts as possible.

Current political conditions have both increased the incentives to gerrymander and exacerbated the democratic pathologies it leads to. Over the last 15 years, American politics on the national level has been subject to a striking paradox: it has become much more competitive at the macro level, when it comes to institutional control, but much less competitive at the micro level, when it comes to individual seats. Recent presidential elections have been very close and the Senate and House have been evenly or very nearly evenly divided. At the same time, the parties in the House have become much more homogeneous and ideologically polarized. Their homogeneity means that the majority party (with near unanimity on critical party matters) can dominate the House more effectively than before even with a small margin. Their polarization, on the other hand, means that the parties feel the stakes of control are higher. It increases both the costs of losing and the benefits of winning. In an almost evenly split House, where even a small gain in seats can make all the difference, parties will struggle hard however they can for each extra seat.

This struggle, of course, can have some positive effects. It may lead parties to field more attractive candidates, may engage party members more deeply in party activities, and may cause some voters to become more interested in politics. It has also had, however, some very bad effects. In particular, it has led parties to draw congressional districts to give their House candidates an

artificial competitive advantage. The strategies are as simple as the stakes are high. In states in which the redistricting power is divided, bipartisan gerrymanders are constructed to create ever safer districts while maintaining the partisan status quo. In states with unified party control, the party controlling the redistricting tries to pack as many of its opponent's voters into as few districts as possible, thereby giving its opponent victories in only a few districts but making every victory a landslide. At the same time, the controlling party tries to create comfortably safe, but less than "landslide" safe, districts for its own candidates everywhere else. That way it can send more of its candidates to the House of Representatives. Under either strategy, the overall result is a diminishing number of seats that are in any real or meaningful way competitive in general elections.

This practice undermines the unique role of the House in several ways. First, it weakens the responsiveness and accountability of each elected representative to voters in the district. As the Framers keenly understood, a representative who does not face the regular and effective discipline of the voters cannot be counted on to reflect their views. Second, it makes the House unrepresentative of the people overall. Making individual seats safe for one party means that the House fails to respond well to changes in underlying public sentiment as the Framers intended. Unless voters' attitudes change dramatically, control of the House will not change at all even though it and the country are nearly evenly divided. Even worse, voters' attitudes can change sharply – leading, say, to a national swing of five percent – and see little impact on House elections when only a tiny fraction of seats are within a five percent margin of change. Third, it can

effectively skew representation away from an overall constituency. If the only meaningful electoral challenge that can take place is in a party primary, a representative may be acutely responsive to the faction of ideological activists who regularly populate party primaries and largely unresponsive to the views of the average voter in the district. Centrist voters of both parties are thus artificially silenced and the House as a whole becomes even more polarized than before, which, in turn, encourages further partisan gerrymandering. The result is a vicious cycle leading to ever more frequent and more severe gerrymandering and worsening polarization in the House.

All this, of course, undermines the special role the Framers designed for the House of Representatives in our national government. Instead of ensuring that representatives have "an immediate dependence on, and an intimate sympathy with, the people," partisan gerrymandering frees them from that dependence. It allows them greater freedom to pursue others' interests and to "think, feel, reason, and act [*un*]like" the people they represent. The more electoral districts are designed to deaden real political competition, in other words, the less effectively elections operate to discipline the people's representatives and ensure that the House as a whole remains truly representative.

ARGUMENT

I. UNPRECEDENTED PARITY BETWEEN THE TWO MAJOR PARTIES ON THE NATIONAL LEVEL HAS CREATED GREAT PRESSURE TO MAKE INDIVIDUAL HOUSE DISTRICTS SAFE FOR ONE MAJOR POLITICAL PARTY OR THE OTHER.

A. The Near Equal Division of the House of Representatives, Its Widening Ideological Polarization, and the Increasing Homogeneity of Each of the Two Major Parties Mean That a Small Change in House Seats Matters Much More Than Before.

As the 2000 and 2004 elections showed, the two major parties enjoy nearly equal popular support across the nation as a whole. In 2000, for instance, while one presidential candidate won a plurality of votes, the other won a victory in the Electoral College; the Senate became split exactly in two; and the majority party's control of the House stood on an extremely slim margin (221-212). Gary C. Jacobson, *A House and Senate Divided: The Clinton Legacy and the Congressional Elections of 2000*, 116 Pol. Sci. Q. 5 (2001). In terms of popular support, the two major parties were more evenly matched than anytime since the nineteenth century. *Id.* at 6. And although the midterm elections of 2002 increased the size of the ruling party's margin in the House by six seats, that margin still stood near its modern low. The 2002 elections culminated a decade-long trend. As figure 1 shows, the *largest* margin of majority in the House since 1992 was less than one-third the historical average from 1960 until 1992, and the average margin for the last ten years is barely one-sixth of the average for the preceding period. *Infra* at App. A-1. By

any standard – historical or absolute – the margin of control in the House has been astonishingly narrow over the past ten years.

At first that might appear a good thing. After all, small margins of control might be thought to force the parties to cooperate, solve problems together, and allow some of their more centrist representatives a greater voice. But for two reasons exactly the opposite is true. First, the major parties in the House have become increasingly polarized. Gary C. Jacobson, The Politics of Congressional Elections 242-50 (5th ed. 2001). Poole-Rosenthal DW-Nominate Scores, a widely accepted measure of congressional ideology, show how markedly the parties have diverged over the last thirty years. *See* Keith T. Poole & Howard Rosenthal, Congress: A Political-Economic History of Roll Call Voting chs. 2-4 and App. A (1999) (explaining and justifying measure). These scores place each member of Congress on a liberal-conservative scale from -1.0 (liberal) to 1.0 (conservative) on the basis of nonunanimous roll call votes. As figure 2 shows, from the early 1970s on, the average scores for members of the Democratic and Republican parties have steadily and radically diverged. *Infra* at App. A-2. In fact, the score gap increased over fifty percent in that time and now amounts to over .86 points on just a 2-point scale.

Second, the major parties in the House have become much more homogeneous. There is now much less divergence than before *within* each party. As comparison of figures 3a-d shows, not only have both parties in the House shifted more towards the extremes, leading to less overlap in their policy positions, but each party has a much more cohesive focus than before. *Id.* at A-3 – A-6 (originally appearing at Jacobson, The Politics of Congressional

Elections, *supra*, at 246-47 figs. 8-4A-4D). In other words, the two major parties in the House have become increasingly discrete and insular. On policy, they are both more distant from each other and more internally homogeneous than before.

In such a world, small differences matter. The vanishingly narrow margins of control over the past ten years mean that a gain of just a few seats can completely switch party control of the House. From the 1970s through the early 1990s, for example, changes of up to 25 seats in any election would have made *no* difference to which party controlled the House. After 1992, however, a difference of as few as six seats and at most 15 would have made *all* the difference. The increasing homogeneity of each party over that same time, moreover, means that the party in control now has a greater focus and has to worry less about its individual members deviating from its preferred policy positions. The increasing polarization sharply raises the stakes of House control for each side. Since larger policy differences separate the parties, which one controls has a greater effect on legislative policy outcomes. In the 1970s, when less distance separated the two parties and they were less homogeneous, which one controlled the House mattered less because the policy outcomes sought and produced under one party would have been more similar to those sought and produced under the other. Once the parties' policy preferences markedly diverged and party members in the House voted more in lockstep than before, however, the policy stakes greatly increased. Because of their ideological polarization, each party wants more extreme policies than before and, because of homogenization, the party in control finds it much easier to achieve its preferred policies even with a small margin. Thus, the

stakes of redistricting have grown in two mutually reinforcing ways: narrow margins of control have meant that differences in just a few seats can change which party controls the House and a difference in party control makes a much larger difference in legislative policy outcomes. Shifting fewer seats produces larger legislative payoffs than before.

The parties understand this. In recent years, congressional redistricting battles in the states have become nastier and more pitched. The stakes are so high, in fact, that national party leaders from Washington have often led the battles. In the present case, for example, the Majority Leader of the United States House of Representatives pushed Texas state legislators to draw a new congressional map even though the existing plan was only one election old and the courts had approved it. *See Balderas v. Texas*, 536 U.S. 919 (2002) (affirming unpublished opinion of 3-judge court). His reason, stated publicly, was clear and simple: "I'm the majority leader, and we want more seats." David M. Halbfinger, *Across U.S., Redistricting as a Never-Ending Battle*, N.Y. Times A1 (July 1, 2003). The attempt produced such bitterness, however, that state representatives of the minority party repeatedly decamped the state in order to deprive one house or the other of the state legislature the two-thirds quorum necessary to pass a new plan. The senate representatives sojourned in New Mexico. *Texas Democrats Are Fined by G.O.P.*, N.Y. Times A9 (Aug. 15, 2003) ("Eleven Democrats have stayed at a hotel in Albuquerque since July 29, keeping the Texas Senate Republican majority from obtaining the quorum it needs to consider a Republican redistricting plan.").

In response, not only did the Texas Department of Public Security seek to arrest and return the minority party representatives to the statehouse but representatives of the United States House Majority Leader pressed several different instrumentalities of the federal government, including the Department of Justice and the Federal Aviation Administration, to help in the effort. Counsel to the United States House Majority Leader, for example, called the Department of Justice and asked if it had the legal authority to assist in forcing the return of the minority party state legislators to Texas. Office of the Inspector General, Department of Justice, An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators 4-6 (Aug. 12, 2003) [hereinafter DOJ Investigation], *available at* http://www.usdoj.gov/oig/special/0308a/final.pdf. Late the day before a senior staffer for the United States Majority Leader called the Federal Aviation Administration's Administrator for Government & Industry Affairs asking for the current and past location of the plane of the former Speaker of the Texas House, which the staffer hoped might lead to the missing members. Statement of Hon. Kenneth M. Mead, Inspector General, U.S. Department of Transportation, Federal Aviation Administration Efforts to Locate Aircraft N711RD (July 15, 2003) (testimony to House Committee on Transportation and Infrastructure), *available at* http://www.oig.dot.gov/StreamFile?file=/data/pdfdocs/cc2003123.pdf. That same day the Texas Department of Public Safety contacted the federal Air and Marine Interdiction Coordination Center (AMICC), an arm of the United States Department of Homeland Security, asking it to locate an aircraft transporting Texas state legislators. Office of Inspector General, U.S. Department of Homeland Security, Report of Investigation IN03-OIG-0662-S, at 1, *available*

at http://www.dhs.gov/interweb/assetlibrary/DHS_OIG_Investigation_Texas.pdf. Employees at all three federal agencies spent time on these requests. The FAA and the AMICC gave state police officials or representatives of the United States House Majority Leader information on the location of the plane. The Department of Justice, after much internal consultation, did ultimately refuse to aid in the return of the errant Texas legislators. One Justice official aptly described the request from the Majority Leader's office as "wacko." DOJ Investigation, *supra*, at 5. So great is the pressure to gain seats that both federal and state political officials attempted to enlist the power of law enforcement and national security agencies for partisan ends. The House Committee of Standards of Official Conduct admonished the Majority Leader for his efforts in this case. Statement of the Committee Regarding Disposition of the Complaint Filed Against Representative Tom DeLay, House Comm. of Official Conduct, 108th Cong., 2nd Sess., *available at* http://www.house.gov/ethics/DeLay_Cover.htm (Oct. 6, 2004). This politicization of the rules of the game severely damages the legitimacy of our democratic process.

B. The Increasing Pressure to Gain Seats Has Led to Making House Districts Uncompetitive in a Way That Favors One Party.

To gain seats through redistricting requires a party in control of the redistricting process in individual states to follow only a simple strategy: that party must make its opponent's districts as few and its own as many as possible. To minimize the number of its opponent's districts, the party in control must pack as many of its opponent's voters as possible into each district the opponent controls. This

leads to the opposition party winning few districts but winning each by a landslide. To maximize the number of its own districts, by contrast, the controlling party must assign as few of its own voters to as many districts as it can while maintaining a reliable majority in each of them. This leads to the controlling party giving itself a comfortable but less sizeable margin in as many districts as possible. The strategy thus aims to make virtually every district uncompetitive and achieves its partisan ends by making the districts differentially uncompetitive for each party. By creating super-safe districts for the opposing party and merely safe districts for itself, the controlling party "wastes" minority party votes and efficiently deploys its own. Knowing that "one person, one vote" and race are virtually their only hard legal constraints, party strategists feel free to draw such lines.

An extreme example demonstrates these possibilities. Imagine a jurisdiction with 100 voters, four seats, and two parties, one of which claims 60 percent of the voters and the other 40 percent. If the voters are uniformly distributed across the jurisdiction, the majority party will necessarily win every seat so long as the districts are drawn contiguously. A uniform distribution of voters ensures that no matter how the jurisdiction draws its districts three majority party voters will accompany every two minority party votes. The only possible way to create a seat for the minority party would be to district noncontiguously on some basis where the voters were not uniformly distributed by party. If party affiliation varied roughly according to economic status, for example, non-geographic districts defined by ranges of wealth could permit the minority party to capture one seat. But, of course, such districts are only a theoretical possibility in our political system.

If the state legislature had complete freedom in assigning voters to districts and knew how individual voters voted, many results are possible. It could randomly assign voters to districts, for example, in which case each of the four districts would contain roughly 60 percent majority party voters and the majority party would win every district. At the other extreme, the legislature could split all the minority party voters evenly among three arbitrary districts. In such a scheme, the minority voters would have a bare majority in the first three districts while the majority party would have a 100% majority in the fourth.[2] Although the majority party would win by much more in the single district it controlled, it would lose three to one in the legislature itself. By differentially distributing party voters across districts, in other words, the legislature would be able to leverage a 40 percent party minority in the electorate into a 75 percent party majority in the legislature. At the extremes, the legislature could lock the minority party out completely, as in the random districts, or it could lock the majority party into a 25 percent minority position. If the parties were completely polarized and homogeneous, moreover, a 25 percent minority would be completely powerless in the legislature. The 75 percent majority would always get its way. At either extreme and in most places in between, for that matter, the legislature's ultimate policy

[2] A state legislature would usually, of course, be interested in boosting the representation of the majority party since the majority party would usually control it. If the present minority party had previously enjoyed control of the legislature and gerrymandered state legislative districts to favor its own candidates, however, it could still control the legislative process despite its minority status and then draw lines to give a majority of a state's congressional seats to minority party candidates. Gerrymandering on the state level can thus induce and compound democratic pathology at the level of the House.

outcomes would reflect less the underlying policy preferences of voters, which would not vary, than how voters were assigned to districts. In a real sense, the people's representatives would reflect the districts of the people rather than the people of the districts.

A party, of course, will usually want to reach no further than it can reliably grasp. Otherwise, a small shift in public opinion can cause its gerrymandering to backfire. *See* Bruce Cain, The Reapportionment Puzzle 151-59 (1984) (explaining how a party that cuts its margins too thin can lose many seats if voter support changes). To prevent this, a party in control of redistricting can be expected to give itself more than a thin margin of victory in its districts and may sacrifice a seat or two in order to ensure that it will continue to dominate its remaining districts if voter sentiment shifts somewhat in the later years of the reapportionment cycle. This insurance deadens competition in nearly every district. The party-victim of the gerrymander will enjoy wins in as few districts as possible but in each by a landslide while the party in control of the gerrymander will enjoy wins in a disproportionately large number of districts but by smaller margins. Few, if any, districts will remain in true competition.

Examples as extreme as those in the above hypotheticals are admittedly rare. In some states, redistricting power is divided between the parties, often producing bipartisan gerrymanders which maintain the partisan status quo while creating safer seats for both parties. Even with unified party control, legislatures do not have complete flexibility in assigning voters to districts. If only to avoid public backlash, they must pay some respect to geography and often as well to political subdivisions and communities of interests. Looking to these other concerns will temper what a state legislature

can do, if only a little. More importantly, until recently state legislatures could not so effectively gerrymander because in many instances they could not accurately predict voting behavior. Above all else, partisan gerrymandering depends on the ability to predict how different groupings of people will vote. If a legislature cannot tell whether drawing districts one way rather than another will help or hurt a particular party, it will not be tempted to gerrymander. As voting behavior becomes predictable, however, partisan gerrymandering becomes possible, powerful, and common.

Although technology has improved redistricters' ability to predict the partisan effects of various plans, the greatest improvement in prediction has come from changes in voting behavior itself. District-level voting behavior is more consistent now than it has been for many years. In the 2002 midterm congressional elections, in fact, fewer congressional districts had split preferences – voting for candidates of different parties for the House and presidency – than in any election in the previous 50 years. *See* Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Pol. Sci. Q. 1, 12 (2003). In only 62 House districts did voters not elect a representative from the same party for which they had voted for President two years before. *Id.* The 2004 results were even more marked. In only 59 House districts did voters not elect a representative from the same party for which they voted for President at the same time. *See* Gary Jacobson, *Polarized Politics*, *supra*, at 207 fig. 5. This increasing district-level consistency parallels a trend in individual voting behavior: the decline of split-ticket voting. From 1972 to 1996 the percentage of voters splitting tickets between presidential and senate candidates has dropped from 28 to 15 percent. Gary C. Jacobson, The Politics of Congressional Elections 149 fig. 6-2 (5th ed. 2001).

Such increased individual consistency allows those redistricting to predict much more accurately the partisan effects of their line-drawing. By understanding how individual precincts voted in the last presidential election, they can more reliably predict how those precincts will vote in future congressional elections and use this information to strategically aggregate precincts to provide majorities of the "right" size to each party.

II. ADVANTAGING ONE PARTY BY MAKING HOUSE DISTRICTS UNCOMPETITIVE UNDERMINES THE UNIQUE ROLE OF THE HOUSE OF REPRESENTATIVES IN AMERICAN GOVERNMENT.

A. By Deadening Competition in House Districts, Partisan Gerrymandering Dangerously Weakens the Responsiveness and Accountability of Representatives to Voters in Their Districts.

Partisan gerrymandering artificially advantages and disadvantages parties by deadening competition in as many districts as possible. Empirical research proves how much this harms the democratic process. As one leading political scientist describes its effects, the latest round of redistricting gave

> marginal incumbents of both parties . . . safer districts. Redistricting gave eight Democratic incumbents who had been representing Bush-majority districts[, districts in which Republican George W. Bush had won the popular vote in the 2000 presidential election,] new Gore-majority districts, [districts in which Democrat Al Gore had won the popular vote in that election]; only one suffered the contrary switch. . . . All thirteen

> of the switches involving Republican incumbents were from Gore- to Bush-majority districts. Of the twenty-five districts Republicans had won in 2000 with less than 55 percent of the major party vote, eighteen were strengthened by increasing the proportion of Bush voters; of the nineteen similarly marginal Democratic districts, fifteen were given a larger share of Gore voters. Thus, three quarters of the marginal districts were made safer by redistricting, half of them by more than [two] percentage points (in presidential vote share). If analysis is confined to districts with marginal incumbents who sought reelection in 2002, thirty-two of their forty districts (80 percent) were made safer by redistricting.

Gary C. Jacobson, *Terror, Terrain, and Turnout*, *supra*, at 10-11. In individual states, the effects could be even more extreme. Gerrymandering in California after the last census, for example, left not a single one of the state's 53 House districts competitive. *Id.* at 10.

Long term trends exacerbate this problem. As figure 4 shows, since at least the mid-twentieth century, competitiveness in House districts has markedly declined. *Infra* at App. A-7. In the decade of elections after the 1960s reapportionment, for example, an average of 73 seats were won with less than 55 percent of the major party vote. In the decade of elections after the 1990s reapportionment, by contrast, that figure fell by more than 10 percent to 65 seats.

More ominously, elections immediately following reapportionment have in recent years nearly always (the 1972 Nixon-McGovern election is the only exception) shown an increase in district competitiveness, but not in

2002. As one commentator has summed up the results appearing in table 1,

> elections held in the immediate aftermath of reapportionment . . . have generated particularly large freshman classes and have returned fewer incumbents than have other elections. On average, more incumbents retire from the House in post-reapportionment election cycles, more are defeated in primaries, more lose in the November general elections, and fewer win landside reelections. . . . [O]n average, since 1972, membership turnover has been about 45% larger in post-reapportionment Congresses, with 87 freshmen rather than 60. If anything, this tendency for greater turnover in post-redistricting election cycles had appeared to be increasing, as the 1992 elections had generated a freshman class with 110 members.

Hirsch, *supra*, at 183.

In the 2002 election, however, the opposite happened. Only 54 freshmen were elected – fewer than average for an ordinary election, far fewer than the average for post-reapportionment elections, and less than half the figure for 1992. This lack of competitiveness was, moreover, peculiar to House elections in 2002. While only approximately nine percent of House seats were decided by margins of ten percent or less, roughly half of U.S. Senate and gubernatorial elections held on that same day were that close. *Id.* at 183.

This fact bodes ill for the rest of the current reapportionment cycle. Since competitiveness typically declines over the course of each cycle, House elections will, if they follow history, become increasingly uncompetitive over the coming decade. In fact, since the 1960s, district competitiveness has on average declined nearly 25 percent from the beginning to the end of each reapportionment cycle. If that historical falloff rate continues – and intercensal districting, like that done by Texas, which aims to deaden competition in even more districts, can only make it worse – by the end of this redistricting cycle only 36 House seats will be competitive, i.e., won by fewer than 55 percent of the major party vote.[3]

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[3] In the 1962, 1972, 1982, and 1992 elections, the first held in those reapportionment cycles, a total of 279 seats were won within this margin. In the 1970, 1980, 1990, and 2000 elections, by contrast, the last held in these cycles, 212 seats were. *See infra* fig. 4 at App. A-7 (supplying figures for each year). The average beginning-to-end falloff rate in this period is thus 24 percent. Applying this figure to the 47 House seats decided within this margin in the 2002 election, predicts a decline to only 36 competitive seats in the 2010 elections.

Deadened competition has both individual and aggregate effects. On the individual level, it means that representatives fear less the regular judgment of the voters. The less competitive districts are, the less representatives will fear defeat at the polls and the less responsive they will be to general election voters. A representative who squeaks by will be very sensitive to what constituents want; a representative assured of a landslide less so. Uncompetitive districts, then, weaken the structures of accountability that the Framers believed made members of the House truly responsive to – and thus truly representative of – the people. They substitute responsiveness to party activists and donors for the rigorous discipline that the Framers intended frequent elections to place on members of the House.

On the aggregate level, deadened competition means that the House of Representatives as a whole will not well reflect changes in sentiment in the voters. Because so few districts can realistically change parties, the House as a whole will fail to track shifts in underlying popular opinion. A national swing of five percent in voter opinion – a sea change in most elections – will change very few seats in the current House of Representatives. Gerrymandering thus creates a kind of inertia arresting the House's dynamic process. It makes it less certain that votes in the chamber will reflect shifts in popular opinion and thus frustrates change and creates undemocratic slippage between the people and their government.

B. By Artificially Advantaging One Political Party over Another, Partisan Gerrymandering Can Be Expected to Skew Public Policy for the Duration of the Reapportionment Cycle.

Although partisan gerrymandering deadens competition within individual districts, that is its method, not its aim. Its aim, of course, is to give one of the major parties an advantage over the other in Congress. Comparing the major parties' shares of the 2000 presidential vote in the pre- and post-reapportionment House districts demonstrates how thoroughly current political gerrymandering has achieved this. As Gary Jacobson has explained, "The Bush-Gore vote division provides an excellent approximation of district partisanship. Short-term forces were evenly balanced in 2000, and party line voting was the highest in decades, hence both the national and district-level vote reflected the underlying partisan balance with unusual accuracy." Gary C. Jacobson, *Terror, Terrain, and Turnout*, *supra*, at 9. In other words, districts won by Democratic candidate Al Gore are generally Democratic while districts won by Republican candidate George W. Bush are generally Republican. As figure 5 shows starkly, the post-census redistrictings helped make many districts comfortably but leanly Republican and many other districts landslide Democratic. The last cycle of redistricting, in other words, made the parties seats differentially safe in a way that gave one side an artificial edge in the House.

In fact, all the districts in the country with party landslides of over 80 percent were won by a single party. In some states, of course, Democratic-controlled redistrictings artificially plumped the Democrats' share of the state congressional delegation; in others, Republican-controlled redistrictings artificially plumped the Republicans'. Both sides are guilty of such advantage-taking because the stakes are simply too high. In the 1980s, California Democrats were among the most notorious offenders. *See Badham v. Eu*, 694 F. Supp. 664 (N.D. Calif. 1988) (3-judge court), *aff'd*, 489 U.S. 1024 (1989). In 2003, the Texas Republicans were. On balance, however, as the figure above shows, the immediate post-2000 census plans advantaged the Republicans. The net effect was to increase the number of Republican districts by nine, from 228 to 237. Gary C. Jacobson, *Terror, Terrain, and Turnout*, *supra*, at 9. The 2003 Texas intercensal redistricting increased the number of Republican districts by a further six. *See* Jacobson, *Polarized Politics*, *supra*, at 201-02. Together they perhaps give one party control of the House for the remainder of the decade no matter what happens politically in the nation. This, of course, could substantively skew national public policy by giving control of the House to a party that otherwise would not have it.

Increasingly consistent and predictable voting behavior on the district level, moreover, means that there is little chance that partisan gerrymanders will become self-defeating. Although some have speculated that partisan gerrymandering is a self-limiting enterprise, *see* Cain, *supra*, at 151-59 (arguing that majority parties will be tempted to cut their margins too thin in order to gain as many seats as possible and will be thrown out of power by moderate shifts in voter opinion), evidence from the last

redistricting suggests less tradeoff between partisan gains and safe seats. Indeed, the more reliably voter behavior can be predicted, the smaller the margins of victory redistricters can employ without having to worry that their plans will later backfire. Furthermore, the newfound eagerness of some state legislatures, like Texas, to redistrict between censuses in order to give the majority party's congressional candidates further advantage – actions unprecedented since the reapportionment revolution began in the 1960s – shows that legislatures can recalibrate plans to ensure they never backfire. If a legislature finds that it cut the majority party's margins in safe districts too thin in its efforts to capture many seats, it can – if the same party still controls the legislature – simply fatten the margins a bit through periodic fine-tuning. Intercensal redistricting thus poses a special danger. It allows a legislature to lock in partisan gains by recalibrating majorities within districts throughout the decade. Such recalibration can negate the natural forces of population change and change of voter sentiment which can otherwise reinvigorate competition within districts and work towards making representatives more responsive to their constituents.

C. Partisan Gerrymandering Artificially Increases Ideological Polarization in the House.

By making individual districts uncompetitive, partisan gerrymandering frustrates the representation of centrist views in the House. Safe districts are drawn to be either more conservative or more liberal than a non-gerrymandered district would be; their average voter is intended to be reliably off the overall median. Artificially

skewing districts in this way is what ensures the election of candidates from particular parties. But that makes it less likely that candidates reflecting the views of these median voters will be elected anywhere. In advantaging one political party, then, partisan gerrymandering not only (1) disadvantages the other major political party and (2) makes districts uncompetitive, but also (3) makes more difficult the representation of views from the center.

Another feature of gerrymandering exacerbates this problem. Deadening competition between the major parties shifts any real political competition in the district into one party's primary, where ideological activists dominate. David Brady & Morris Fiorina, *Congress in the Era of the Permanent Campaign*, *in* The Permanent Campaign and Its Future 134, 135-36 (2000). Centrist candidates of both parties have trouble surviving in safe districts because in the primaries they must appeal to a group of voters representative neither of the district as a whole nor of even the party as a whole but only of the majority party's most intense members. More sharply ideological candidates appeal to this primary electorate. Democratic primary voters vote for more left-leaning candidates than the average Democrat, let alone the average voter, would and Republican primary voters vote for more right-leaning candidates than the average Republican or average voter would. As a result, districts elect candidates more extreme than the voters and the House has become bipolar even though the country has stayed largely in the middle. Making districts safe thus silences the vital center. Unlike the Framers' vision, a gerrymandered House reflects not popular sentiment in all its diversity but the sentiment of one extreme or the other in districts across the country. And that is not the worst. Just

as polarization within the House is one of the primary effects of partisan gerrymandering, it is also one of the primary causes. As discussed previously, polarization of a nearly evenly split House greatly raises the stakes of redistricting and so increases the incentives to gerrymander, which in turn leads to further polarization in the House. Far from limiting itself, under these conditions, partisan gerrymandering is self-intensifying. Polarization and partisan gerrymandering form a vicious circle where increases in one increase the likelihood of the other. Together with intercensal redistricting they ensure the defeat of the Framers' clear vision of the House.

CONCLUSION

Amici agree with Appellants' arguments on the law concerning the constitutionality of partisan gerrymandering and intercensal redistricting. For the reasons stated in Appellants' brief on the merits and for the reasons stated here, Amici strongly believe that this Court should develop workable standards to discipline egregious forms of partisan gerrymandering and foreclose intercensal redistricting motivated only by partisan advantage. Accordingly, Amici respectfully urge this Court to reverse the judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

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Table 1
Comparison of the 2002 Election
With Elections from 1972 to 2000

Category	*Average "Normal" Election (1974-1980, 1984-1990, 1994-2000)*	*Average Post-Reapportionment Election (1972, 1982, 1992)*	*2002 Election*
Incumbents reelected	375	348	381
By >20 points	297	261	338
By <20 points	78	87	43
Incumbents defeated	21	35	16
In the primary	3	13	8
In the general	18	22	8
Incumbent retirements	37	48	35
New members	60	87	54

Id. at 183 tbl. 1.

Hirsch, *supra*, at 197.

Figure 5
Distribution of Bush Districts and Gore Districts in the 2002 Plans

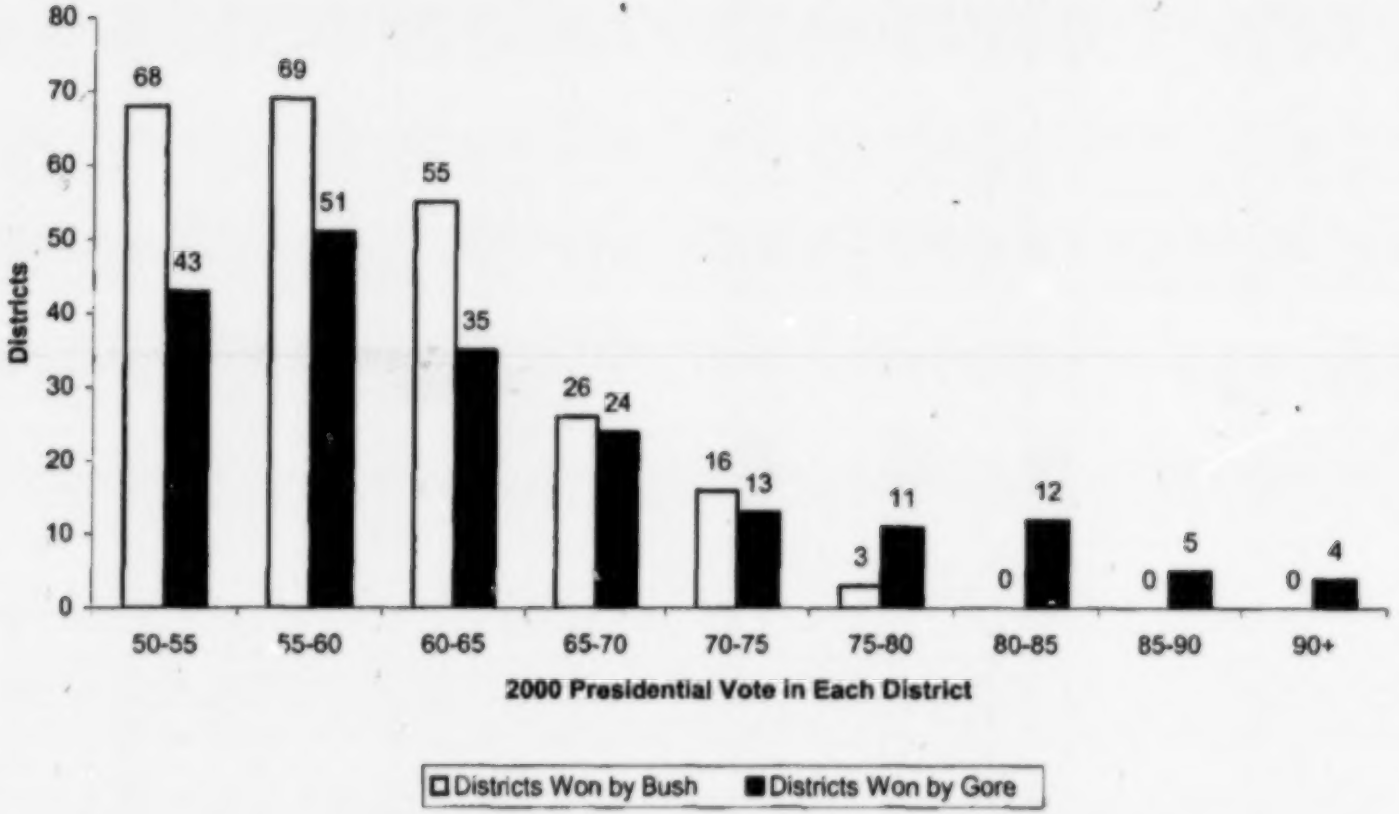
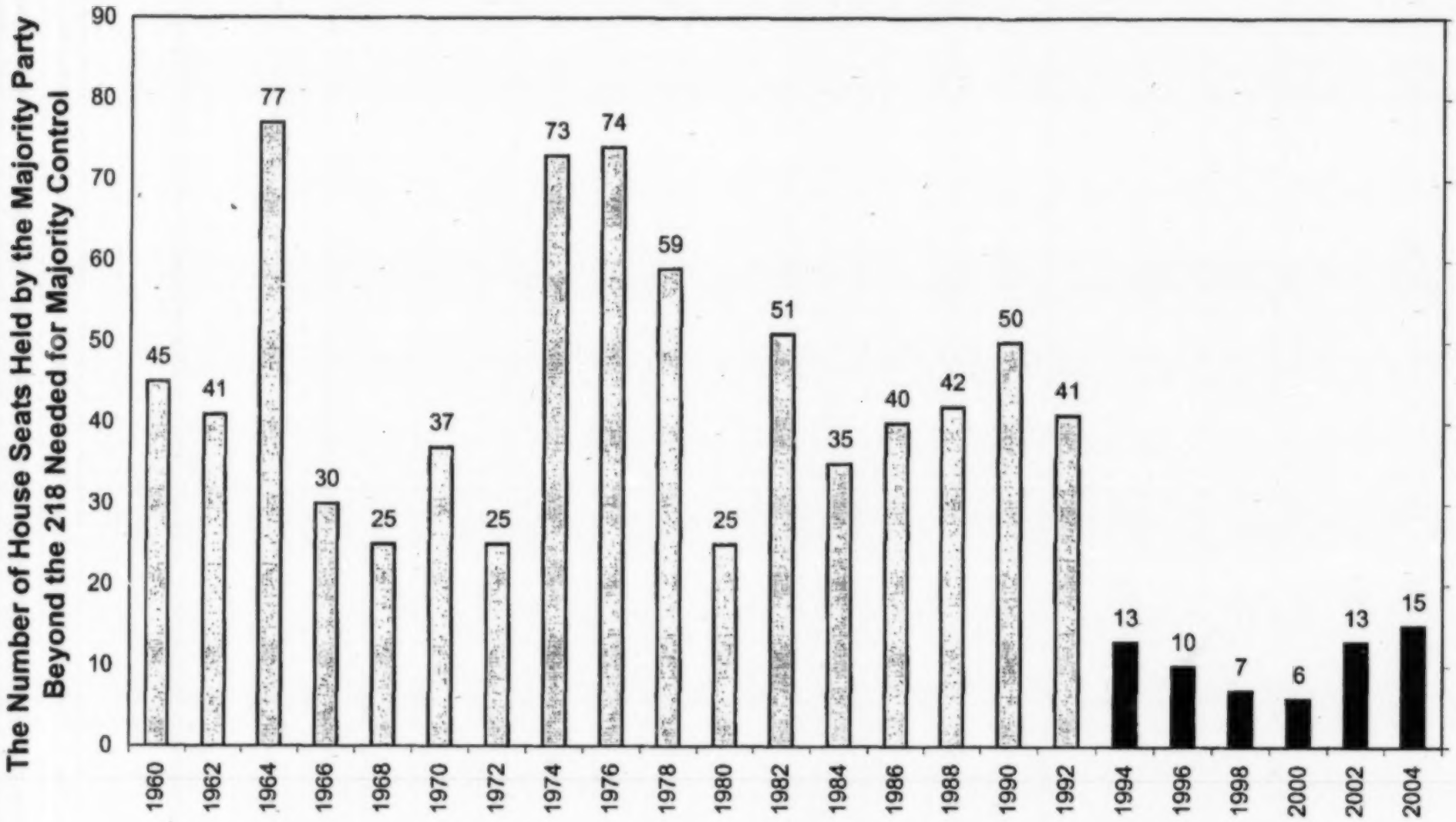
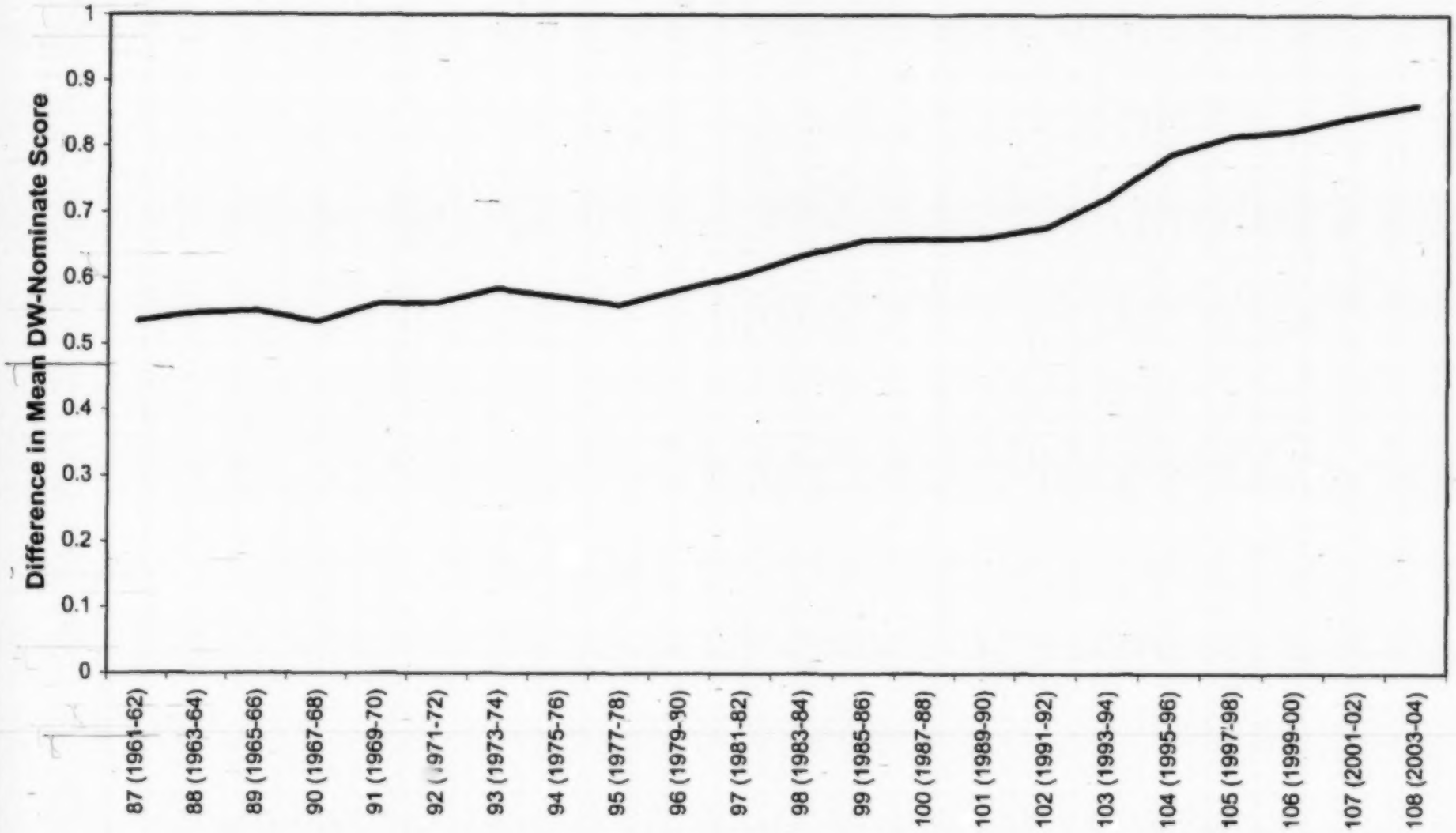


Figure 1: The Size of House Majorities, 1960-2004



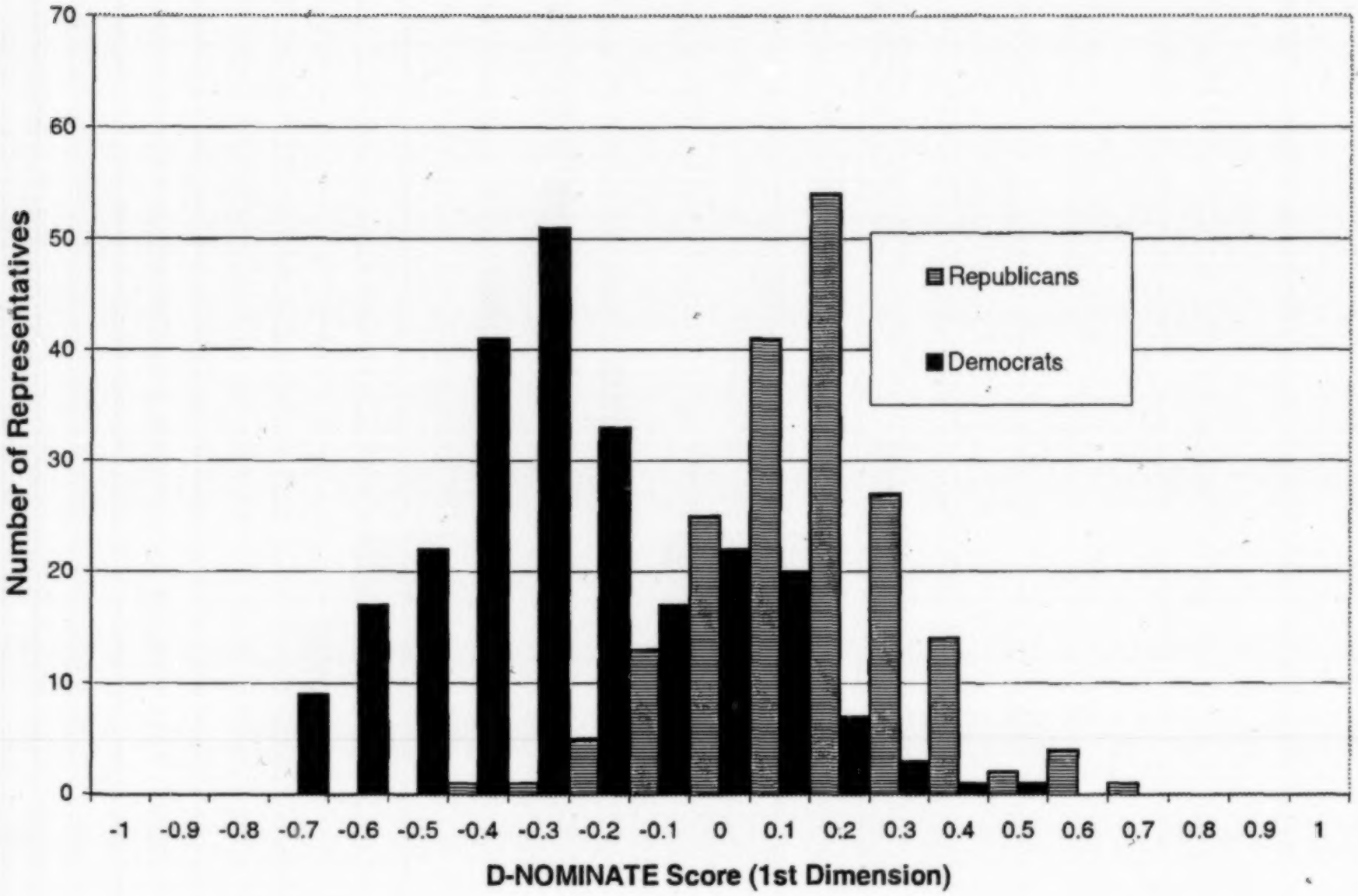
Sources: 1960-2000: Calculated from data in Norman J. Ornstein, Thomas E. Mann, and Michael J. Malbin, *Vital Statistics on Congress 2001-2002* (Washington, D.C.: American Enterprise Institute, 2002), Table 1-19; 2002: Office of the Clerk, House of Representatives, "Congressional Profile" at http://clerk.house.gov/members/congProfile.php. The 2004 figure calculated by Gary C. Jacobson.

Figure 2: Ideological Difference Between the House Parties, 87th Through 108th Congresses



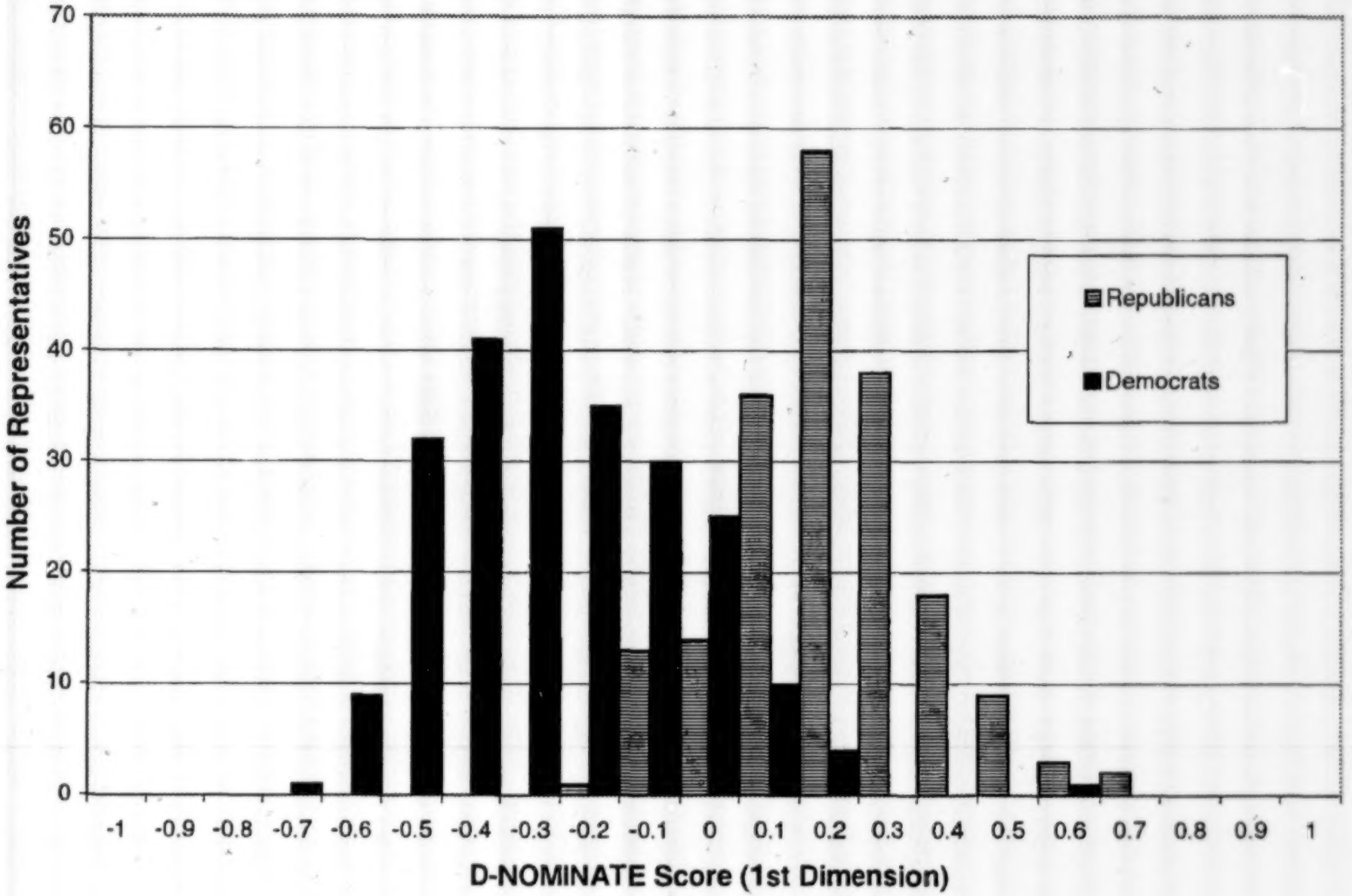
Source: Computed by Gary Jacobson from DW-Nominate Scores calculated by Keith T. Poole and Howard Rosenthal, available at http://voteview.com

Figure 3a: 93rd Congress (1973-74)



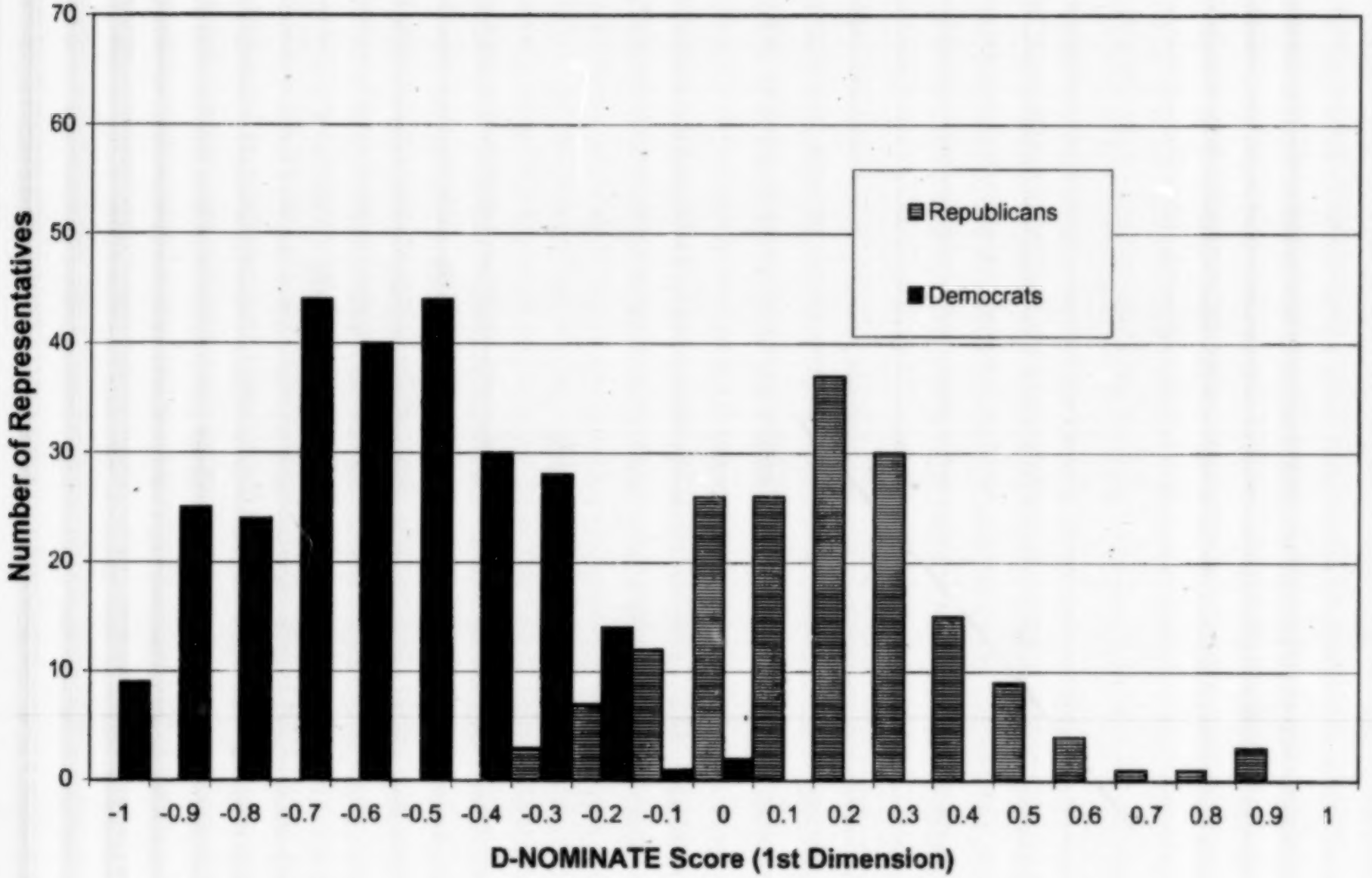
Source: See text.

Figure 3b: 97th Congress (1981-82)



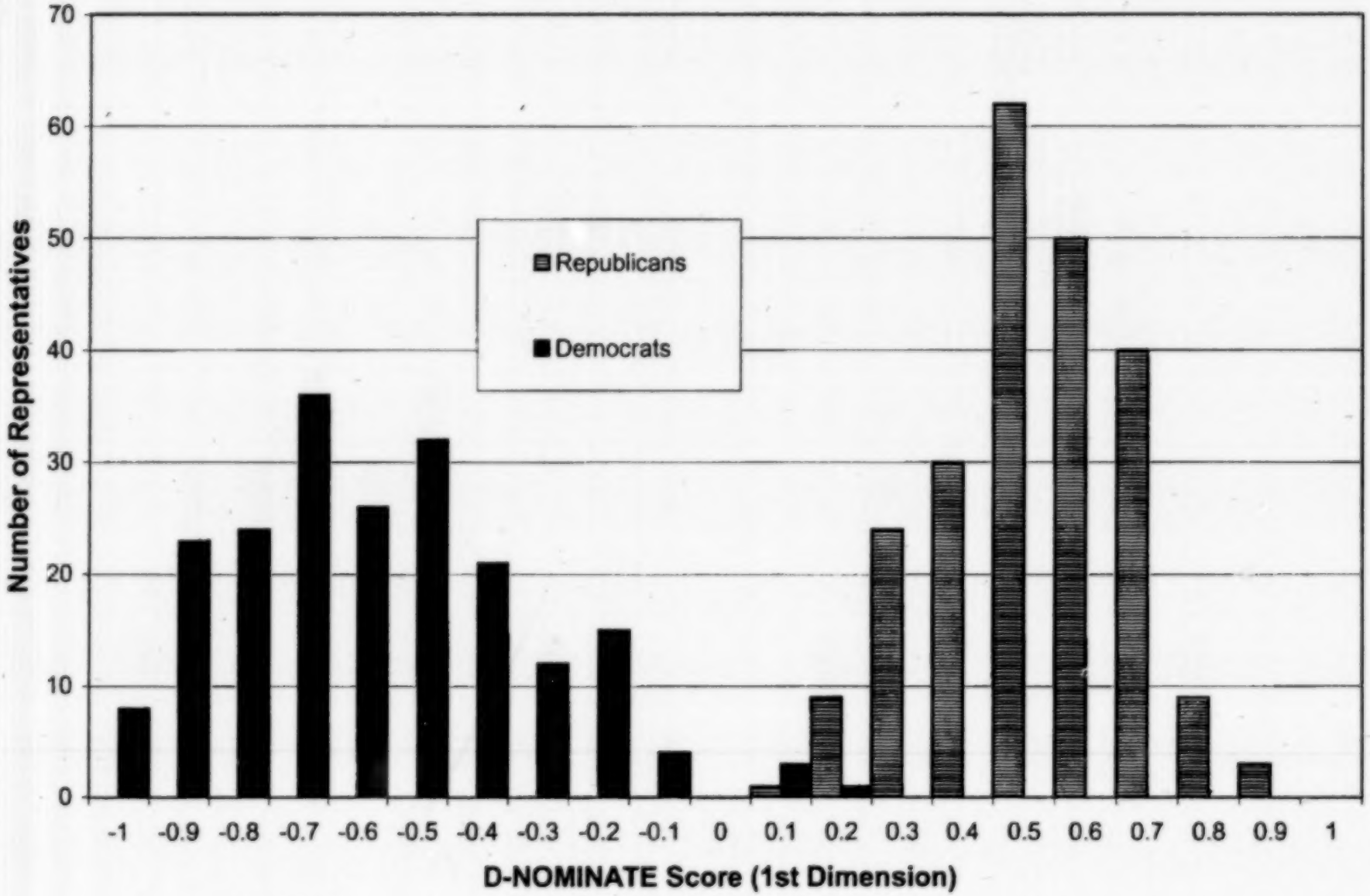
Source: See text

Figure 3c: 101st Congress (1989-90)



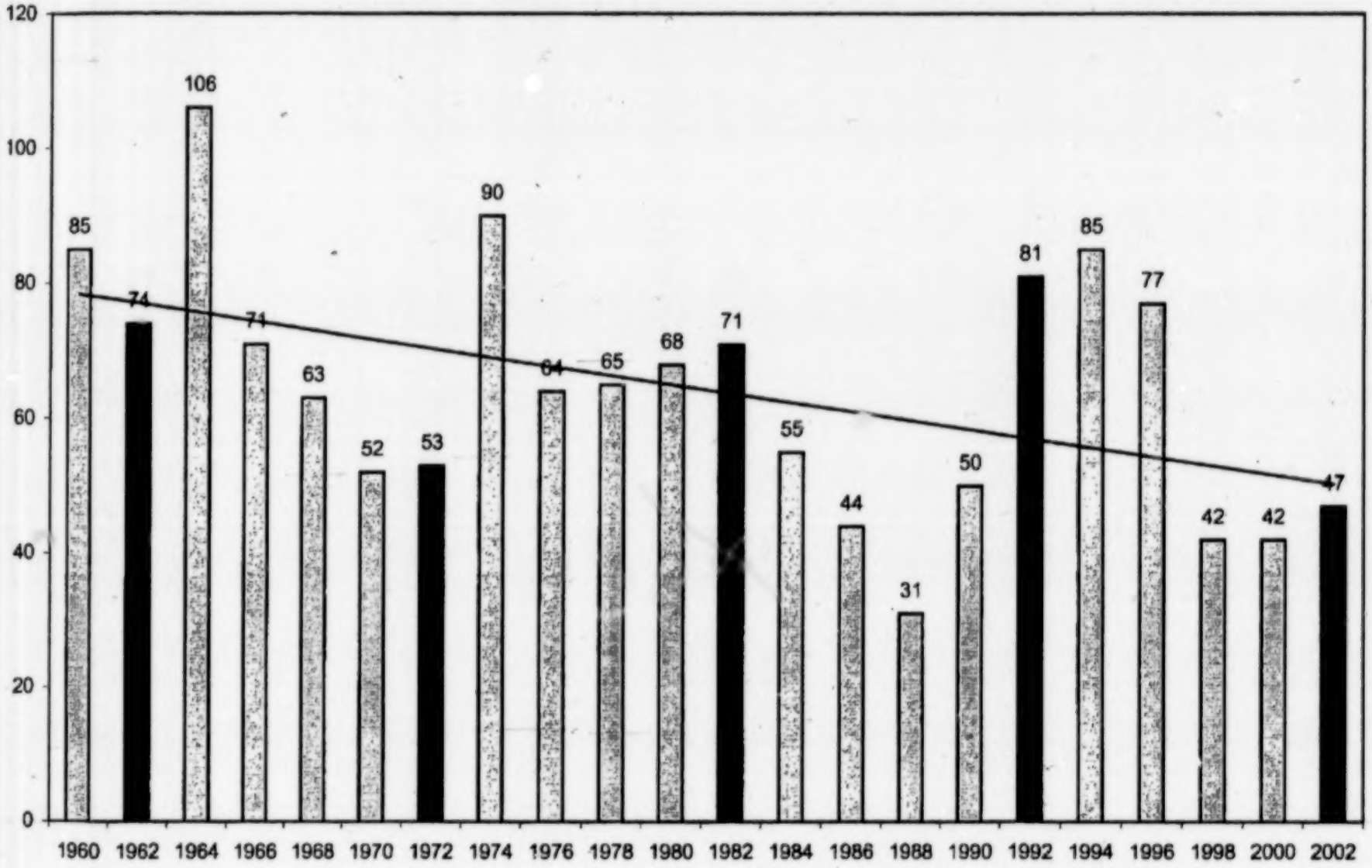
Source: See text

Figure 3d: 105th Congress (1997-98)



Source: See text

Figure 4: House Seats Won With Less than 55% of the Major Party Vote, 1960-2002



Sources: Compiled by Gary Jacobson from data in *Congressional Quarterly's Guide to U.S. Elections*, 2nd. Ed. (Washington, D.C.: Congressional Quarterly, 1985); Michael J. Dubin, *United States Congressional Elections, 1788-1997* (Jefferson, NC: MacFarland & Company, 1998); and U.S. Federal Election Commission, "Recent Election Results," at http://www.fec.gov/elections.html.

(12) (12) (13) (13)

FILED
FEB 1 -

Nos. 05-204, 05-254, 05-276 and 05-439

IN THE

Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Appellants,*

v.

RICK PERRY, GOVERNOR OF TEXAS, *et al.*, *Appellees.*

TRAVIS COUNTY, TEXAS, *et al.*, *Appellants,*

v.

RICK PERRY, GOVERNOR OF TEXAS, *et al.*, *Appellees.*

EDDIE JACKSON, *et al.*, *Appellants,*

v.

RICK PERRY, GOVERNOR OF TEXAS, *et al.*, *Appellees.*

GI FORUM OF TEXAS, *et al.*, *Appellants,*

v.

RICK PERRY, GOVERNOR OF TEXAS, *et al.*, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Texas

BRIEF OF THE REPUBLICAN NATIONAL COMMITTEE AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee ("RNC") is an unincorporated association that represents the National Republican Party – including Republican congressmen and women, state legislators, and registered voters – and its interests are directly affected by the redistricting process in all fifty states, including Texas.[1] The RNC seeks fair redistricting procedures nationwide, such as those used by the Texas legislature in drawing the Texas 2003 legislatively enacted congressional map, Plan 1374C (the "Texas Map"), because such procedures protect against egregious partisan gerrymandering that dilutes opportunities for Republican congressional and state legislative candidates to win elections, and denies Republican voters their rights to full representation and to full participation in the political process.

SUMMARY OF ARGUMENT

1. If a political party has geographically identifiable and stable demographic voting segments, sophisticated technology makes it possible to draw a congressional map that locks that party into winning a majority of the delegation despite losing the popular vote. Such a partisan gerrymander violates the Fourteenth Amendment's equal protection clause. The Texas Map does not constitute such a political gerrymander, and it does not violate equal protection. This Court's political gerrymandering jurisprudence, beginning with *Davis v. Bandemer* and continuing through *Vieth v. Jubelirer*, makes clear that the Texas Map is not constitutionally deficient. The Texas Map survives scrutiny under the Court's plurality standard in *Bandemer*; indeed, the Texas Map survives scrutiny under any cognizable standard of vote dilution. On the contrary,

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

the legislatively drawn Texas Map more accurately translates the Texas vote into Congressional representation.

2. Appellants' argument with respect to the Voting Rights Act amounts to interest group politics, which Justice White made clear in his *Thornburg v. Gingles* concurrence should play no part in the Act. The Voting Rights Act of 1965 was a legislative response to the violence that erupted in Selma, Alabama, when African-Americans simply tried to register to vote. The legislative record makes clear that legislators from *both* parties supported the Voting Rights Act's initial passage and each of its three following renewals as a means to tear down historical impediments to political participation that were (and are) targeted at or effecting minority populations – in particular, policies and programs designed to, or that did, stop African-Americans from voting. Based upon the Act's language, case law, the legislative record, and the historically clear and strong support of the Act by a majority of Republican congressmen and the Republican Party, it defies logic to argue that the Act was intended to favor one *political party* over another.

ARGUMENT

I. THE TEXAS 2003 LEGISLATIVELY ENACTED CONGRESSIONAL MAP DOES NOT VIOLATE THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE.

Partisan gerrymandering removes control of legislative bodies from the hands of the electorate. By definition, partisan gerrymandering accords different weight to different votes on the basis of political party. A party with geographically identifiable and stable demographic voting segments can combine with clever cartographers to create a map that institutionalizes single-party domination over a state's congressional delegation against popular will. Such partisan

gerrymandering dilutes the votes of one (or more) party's voters in violation of the Equal Protection Clause of the Fourteenth Amendment. The RNC has consistently articulated this concern and a plurality of this Court has recognized the potential for such a violation since *Davis v. Bandemer*.[2] 478 U.S. 109 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) ("the issue we have discussed is not whether severe partisan gerrymanders violate the Constitution, but whether it is for the courts to say when a violation has occurred, and to design a remedy"); *see also* Brief of Amicus Curiae Republican National Committee, *Bandemer*, 478 U.S. 109 (1986). The RNC's position on partisan gerrymandering remains unchanged.[3] While no single standard for determining an unconstitutional political gerrymander has emerged, it is clear that the Texas Map is not an unconstitutional political gerrymander under *any* standard.

A. The Texas Map Does Not Meet the Standard Set Forth By the *Bandemer* Plurality.

The Court first articulated a standard for establishing an unconstitutional partisan gerrymander in its plurality opinion in *Bandemer* – the only such standard that has ever been judicially

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[2] Despite the Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267, the justiciability of political gerrymander claims has not been foreclosed. 541 U.S. at 306-17 (Kennedy, J., concurring).

[3] Notably, the Democratic Party has failed to hold a consistent view; for example, in *Bandemer*, the Democratic Party filed an *amicus* brief that argued Indiana's map was unconstitutional – yet application in this case of the very standard argued for in that brief would likely have led to the Court's invalidating the Texas map that Appellants *favor* – the 2001 court drawn interim map. Moreover, it is notable that Democrats and/or their associated parties have not challenged maps in states such as California or Massachusetts – states in which the Democratic percentage of the congressional delegation far exceeds the Democrats' share of the popular vote.

endorsed.[4] The Court set this standard aside in *Vieth*; however, while *Bandemer's* test was never successful in identifying what does constitute an unconstitutional political gerrymander, it is instructive in this case insofar as it helped identify indicia of what does not.

Bandemer's standard was two-pronged: plaintiffs had to show intentional discrimination against, and actual discriminatory effects upon, an identifiable political group. *Bandemer,* 478 U.S. at 127. A threshold showing of discriminatory vote dilution was required to make out an initial equal protection case. Such vote dilution, in turn, triggered a violation only when the electoral system was arranged in a manner that "consistently degrades a voter's or a group of voters' influence on the process *as a whole*." *Id.* at 132 (emphasis added). Simply because a particular redistricting map made it more difficult for a particular group, including a political party, in a particular district to elect their representatives was not enough to show a discriminatory effect – winning elections was not the sole determinant of political

---

[4] Political gerrymandering equal protection claims have consistently been analyzed under rational relationship level of scrutiny, and the RNC does not argue here for the Court to apply a different level of scrutiny in this context. The Court has steadfastly refused to apply strict scrutiny to redistricting maps challenged on equal protection grounds on the basis of political gerrymandering. *See, e.g., Vieth*, 541 U.S. 267, 313-14 (Kennedy, J., concurring) ("[t]he Fourteenth Amendment standard governs [political gerrymandering claims]; and there is no doubt of that"); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion) ("[w]e have not subjected political gerrymandering to strict scrutiny"); *see also Johnson-Lee v. City of Minneapolis*, 2004 WL 2212044 (D.Minn.) (2004) ("[t]his Court interprets Justice Kennedy's choice of language [in *Vieth*]...as referring to the rational relation standard").

participation.[5] *Id.* at 131; *see also Badham v. Eu*, 694 F. Supp. 664, 669 (N.D. Cal. 1988) (effects test requires more than "present *or projected* election results under the challenged districts" (emphasis added)). Therefore, that fewer Democratic congressional candidates were elected in 2004 under the Texas Map would not be enough to invalidate the map.

The relevant discriminatory effects inquiry asked whether voters had been denied their ability to directly or indirectly influence the elections of a state legislature as a whole. *Bandemer*, 478 U.S. at 133. The Court set forth two broad categories in analyzing whether such a denial existed: (1) history of disproportionate election results visited on the plaintiffs; and (2) indicia of lack of political power or fair representation. *See id.* at 139; *Pope v. Blue*, 809 F. Supp. 392, 396 (W.D.N.C. 1992). Further, it is important to note that an equal protection claim based on partisan gerrymandering must ultimately be evaluated with respect to the makeup of the representative body that the map affects.[6] *See Bandemer*, 478 U.S. at 133. Since the Texas Map, however, is a *congressional*

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[5] In addition, the *Bandemer* plurality held it would not be enough even to establish that the purportedly disadvantaged party had been "placed in a district with a supermajority of other [of that party's] voters" or that the district "departs from pre-existing political boundaries." *See Bandemer*, 478 U.S. at 140-41.

[6] *Bandemer* articulated a different inquiry for challenges directed at individual districts rather than those, such as in this case, which are directed at a statewide map. *See Bandemer*, 478 U.S. at 133. Since this case involves a congressional map, the relevant inquiry must be the Texas's voters' influence on the makeup of the United States House of Representatives as a whole. Appellants' challenge would therefore be properly supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process *nationwide*, rather than simply within the state of Texas. *Id.* at 133. Regardless of which point of reference is used, however, the threshold is not met in this case.

map, any accurate measure of "fairness" must view the Texas delegation in the context of the United States House of Representatives – and in 2004, Democrats won 46.6 percent of the national congressional vote and 46.4 percent of House seats. CLERK OF THE U.S. HOUSE, REPORT ON STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 2, 2004 (2005) *available at* http://clerk.house.gov/members/electionInfo/2004election.pdf (last visited Jan. 27, 2006). The Texas Map cannot be adjusted without altering this national balance. Appellants wholly fail to address this concern, or offer to any explanation as to why this demonstrates some "unfairness" on the part of the Texas Map.

Justice Powell, in his *Bandemer* concurrence, articulated an alternative standard for unconstitutionality that, although rejected by the Court in *Vieth*, the Texas Map also survives. Adhering to the intent and effect framework, Justice Powell wrote that the relevant inquiry's focus should be "whether district boundaries had been drawn solely for partisan ends to the exclusion of all other neutral factors relevant to the fairness of redistricting." *Bandemer*, 478 U.S. at 161 (Powell, J., concurring in part and dissenting in part). Justice Powell offered the following factors, among others, to consider: (1) the shapes of voting districts and adherence to established political subdivision boundaries; (2) the nature of the legislative procedures by which the apportionment law was adopted; (3) any legislative history reflecting contemporaneous legislative goals; and (4) evidence concerning population disparities and

statistics tending to show vote dilution.[7] *Id.* at 161. Appellants fail to offer support evidencing discriminatory effect in *any* of Justice Powell's suggested categories; if anything, the evidence demonstrates that the Texas Map redresses such discriminatory effects that had been visited upon *Republicans. See Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005).[8]

Over time, lower courts attempting to apply *Bandemer* in political gerrymandering cases unanimously failed to find a constitutional violation. *See Vieth,* 541 U.S. at 279-80. Undoubtedly, some of this record is due to the difficulties inherent in applying *Bandemer's* test and in attempting to discern a concept as slippery as "political fairness." It is also due, however, to the high threshold the *Bandemer* plurality set

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[7] This standard was rejected by the Court in *Vieth*: "Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decision making." 541 U.S. at 292.

[8] The *Henderson* Court cited multiple sources in support of its view of past Texas redistricting maps as highly partisan gerrymanders. *See Henderson,* 399 F. Supp. 2d at 768 n. 47 (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1510 (2003) ("The plan carefully constructs democratic districts with incredibly convoluted lines and packs heavily Republican suburban areas into just a few districts") and Brian P. Marron, *Doubting America's Sacred Duopoly: Disestablishment Theory and the Two-Party System*, 6 TEX. F. ON C.L. & C.R. 303, 307 (2002) ("Texas experienced what is sometimes referred to as 'the great partisan gerrymander of '91'... this 'packing' strategy helped the Democrats in the 1992 election to win 21 of the other 22 districts")).

for finding a partisan gerrymander unconstitutional.[9] *See Bandemer*, 478 U.S. 109; *see also Pope*, 809 F. Supp. 392. This bar is high for good reason: too low a threshold would invite attacks on virtually every single legislatively drawn map, swamp the federal courts in litigation, and force the judiciary ever deeper into the "political thicket." *See Bandemer*, 478 U.S. at 143 (noting that the standard was "of necessity a difficult inquiry"); *see also Vieth*, 541 U.S. at 300-01 ("[t]he vaguer the test for availability, the more frequently interest rather than necessity will produce litigation"); *Colegrove v. Green*, 328 U.S. 549, 556 (1946). Appellants have offered no justification for lowering the bar in this case.

B. The Texas Map Survives Any Cognizable Standard of Vote Dilution.

More than satisfying *Bandemer's* constitutional standard, the Texas Map meets any "substantive notion of fairness" and survives scrutiny under *any* cognizable standard of vote dilution. *See Vieth*, 541 U.S. at 299, 344. This is underscored by Texas's redistricting history – about which the District Court analyzing the Texas Map in *Henderson v. Perry*, 399 F. Supp. 2d 756 (E.D. Tex. 2005), stated:

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[9] During oral argument in *Vieth*, the following colloquy took place between Appellant's counsel, Paul M. Smith and Chief Justice Rehnquist:

> Mr. Smith: But the lower courts have since effectively overruled *Bandemer* by requiring factual showings of plaintiffs that are impossible and I submit irrational...
>
> The Chief Justice: Do you think the lower courts didn't follow *Bandemer* then? I mean, *Bandemer* set a very high standard. MP3 File: Oral Argument in *Vieth*, 541 U.S. 267 (argued Dec. 10, 2003), *available at* http://www.oyez.org/audio/cases/1648/argument.mp3.

> While the present plan, drawn by a Republican Party majority in 2003, has been decried as egregious, the story must begin with the earlier map drawn by a Democratic Party majority in 1991. That plan, put in place following the 1990 census, was cited in the political science literature as an extreme example of what one party can do in drawing a redistricting map to the detriment of the other. In 2000, the Democratic Party gerrymander was still in place and, although Republicans now enjoyed substantial statewide majority strength, the results of the congressional elections favored Democrats by a seventeen to thirteen margin. *Id.* at 767-68.

No one standard came out of *Vieth*, but four different potential standards were suggested – one by the plaintiffs, and one by each dissenting justice. The Texas Map does not meet any of these standards.

The Texas Map Yielded Election Results That Were Closer to Proportional Partisan Representation Than Those Under the 2001 Court Drawn Map.

While the Court has rejected proportionality as a requirement, it is relevant as a measure of "fairness" for purposes of surviving a vote dilution claim.[10] *See Johnson v.*

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[10] This Court has repeatedly rejected any claim that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *See Vieth,* 541 U.S. at 288 ("[the constitution] guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups"); *see also Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) ("we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them").

De Grandy, 512 U.S. 997, 1023 (1994). Indeed, "disproportionate election results" has been the gravamen of virtually every political gerrymandering complaint, underlying most standards suggested to adjudicate political gerrymandering claims. The Texas Map resulted in party representation in the Texas congressional delegation that closely reflected the percentage of the congressional vote each party won in 2004. As a result, the 2004 delegation was undeniably closer to being proportional than the 2001 delegation elected under the interim court drawn map (or elected under any other Texas congressional map in decades).[11] Moreover, judging fairness in this regard, the Texas Map exceeds both maps that were challenged, and upheld by the Court, in *Bandemer* and *Vieth*.[12]

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[11] *See, e.g.*, MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, (2003) at 1508 ("In the U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001").

[12] In *Bandemer*, the Democrats had received 51.9% of the votes cast for the State House of Representatives statewide to the Republicans' 48.1%, yet out of 100 available seats, the Democrats had won only 43 to the Republicans' 57. Despite these results, the Court refused to find Indiana's map in violation of the Equal Protection Clause. *Bandemer*, 478 U.S. 109. Such quantitative "unfairness" also existed under the 2002 Pennsylvania congressional redistricting map challenged in *Vieth*. 541 U.S. 267. The *Vieth* map resulted in Republicans controlling 63% of Pennsylvania's congressional seats despite the fact that Republican statewide candidates captured only 46% of the vote against 51% for the Democrats. *See* Bureau of Commissions, Elections and Legislation, Pennsylvania Department of State, 2004 General Election Returns, *available at* http://web.dos.state.pa.us/cgi-bin/ElectionResults/elec_archive.cgi?which=Archive (last visited Jan. 26, 2006).

There Is No History of Disproportionate Election Results Visited Upon Appellants.

Texas electoral history displays no signs of disproportionate election results affecting the Democratic Party. Indeed, if this history demonstrates anything at all it is that Appellants *benefited* from disproportionate election results for decades and the Texas Map merely corrected the Democrats' disproportionate hold on the Texas congressional delegation. Or, in the words of the *Henderson* Court:

> The State's description of the 2003 Texas legislative plan as dismantling a prior partisan gerrymander that had entrenched a minority party [the Democrats], in order to allow a party with overwhelming statewide voting strength [the Republicans] to capture two-thirds of Texas's congressional delegation, *is a characterization that the record supports. Henderson*, 399 F. Supp. 2d at 770 (emphasis added).

Moreover, Appellants' complaint is based only upon the results of the 2004 election. Yet this Court has been clear that a partisan gerrymandering claim is particularly difficult to support when it comes after just a single election held under a newly redrawn map. *See Bandemer* 478 U.S. at 135 ("[r]elying on a single election to prove unconstitutional discrimination is unsatisfactory"). Indeed, without a finding that a reapportionment will consign a political party to the minority during a decade or that that party "has no hope" of doing better in the next round of redistricting, it is an error to find an equal protection violation. *Id.* at 135-36; *cf. Vieth*, 541 U.S. at 363-64 (Breyer, J., dissenting). Appellants do not, because they cannot, demonstrate anything of the sort.

There is No Indicia of Lack of Political Power and Denial of Fair Representation.

In order to demonstrate lack of political power and denial of fair representation, a plaintiff must show that his or her political group has "essentially been shut out of the political process." *See id.* at 139. Yet Appellants have offered no evidence, nor have they alleged, that there has been any interference with their fundraising, registration, organizing, voting, campaigning, or other activities. *See Badham,* 694 F. Supp. at 671-72. Indeed, despite their recent lack of success at the polls, the Texas Democratic Party has successfully raised money, registered voters, organized, and mounted vigorous campaigns up and down the ballot in Texas in 2004. Rather than being shut out from the process, the Texas Democratic Party is fully engaged in it. For example, on January 7, 2006 the Galveston County Democratic Party hosted a "Turn Texas Blue" event. *See* http://www.galvestoncountydemocraticparty .com/Special/TTB/index.htm. "Turn Texas Blue" featured prominent national and state Democratic speakers such as Democratic National Committee Chairman Howard Dean, Texas Democratic Party Chairman Charles Soechting, 2004 Democratic vice-presidential nominee John Edwards, General President of the United Steelworkers Union Leo Gerard, and – notably – 2006 Texas Democratic *congressional candidates* Nick Lampson and Shane Sklar. *See Texas Democrats To Meet On The Island*, THE [Galveston County, TX] DAILY NEWS,

Dec. 28, 2005. Finally, reports indicated strong grassroots and registration activity by the Texas Democrats in 2004.[13]

1. The *Vieth* Plaintiffs' Standard.

In *Vieth,* the plaintiffs' suggested test used *Bandemer's* two-prong framework and identified specific factors for determining whether a discriminatory effect had been visited upon the purportedly disadvantaged political party. Under this test, the requisite effect would be shown when (1) the plaintiffs show that the districts systematically "pack and crack" the rival party's voters, and (2) the court's examination of the "totality of the circumstances" confirms that the map can thwart the plaintiff's ability to translate a majority of votes into a majority of seats. *See Vieth,* 541 U.S. at 286. Even setting aside the Court's unwillingness to view the results of a single election as sufficient evidence of discrimination, Appellants have not, because they cannot, demonstrate that the Texas Map systematically cracks and packs Democratic voters. Justice Scalia noted about this test in *Vieth* that plaintiffs' test would invalidate a map only "when it prevents a majority of the electorate from electing a majority of the representatives." *Id.* at 287. Yet Appellants cannot make such a showing here; the

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[13] Travis County Democratic Party Chairman Chris Elliot issued a glowing press release with respect to this activity, stating: "I cannot stress enough how great [the 2004] election was for the Travis County Democratic Party as a whole. We saw more grassroots enthusiasm and anticipation in this election than in any other in recent memory. In addition, the Democratic enthusiasm in Travis [County] *seems to be spreading to neighboring counties* as Hayes and Williamson [counties] ramped up their Democratic activism during this election cycle." Chris Elliot, *A Message from TCDP Chair Chris Elliot*, Travis County Democratic Party Press Release, Nov. 2004 (emphasis added). This view was supported by the Travis County Constable, Bruce Elfant, who stated: "I think the Texas Democratic Party is on the rebound...[w]e're seeing record voter registration drives and an interest level that I haven't seen in years." April Castro, *Texas Democrats Hopeful Despite Low Point*, THE ASSOCIATED PRESS, July 30, 2004.

most they can show is that the Texas Map brings the state's congressional representation closer to proportionality than virtually any Texas map in decades. Indeed, under the *Vieth* plaintiffs' standard the Texas 2001 interim court drawn map would likely have been *overturned* as a partisan gerrymander.

2. The *Vieth* Dissenters' Standards.

In *Vieth*, Justice Souter's dissent articulated a standard for identifying unconstitutional partisan gerrymandering that focused on individual districts, rather than on an entire statewide map. *Vieth*, 541 U.S. at 343-55. This standard offered a five-step prima facie test for adjudicating partisan gerrymandering claims. To meet this test, Appellants would be required to show that (1) they are members of a cohesive political group; (2) that the district of their residences paid little or no heed to traditional districting principles; (3) that there were specific correlations between the district's deviations from traditional districting principles and the distribution of the population of their group; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of their group, and deviates less from traditional districting principles; and (5) that Appellees acted intentionally to manipulate the shape of the district in order to pack or crack their group. First, the Court has indicated that packing and cracking must be dilutive in order to trigger a violation, *see Shaw v. Reno*, 509 U.S. 630 (1993), and as discussed above, the Texas Map is not dilutive. Second, it is illogical to believe that the Texas Map fails this test when the very relief that Appellants ask this Court to grant is a return to a map – the 2001 court drawn interim map – that under this test is *more* of a partisan gerrymander.

The standard outlined in Justice Stevens's dissent also focuses on individual districts, rather than on an entire statewide map. *Vieth*, 541 U.S. at 317-41. Under this standard,

partisan gerrymandering claims would be analyzed under strict scrutiny – if partisan motivation was the predominant consideration in drawing district lines, absent a showing of neutral justificatory criteria, the district would be invalid. In this case, however, no sophisticated analysis is necessary to demonstrate that the Texas Map passes the test. A cursory visual inspection of the Texas Map suffices to show that the Texas Legislature adhered to traditional redistricting criteria, particularly when compared to Texas's last legislatively enacted congressional map, the 1992 map.[14]

Justice Breyer's dissent sets forth several hypotheticals, arranged on a continuum, which might indicate unconstitutional political gerrymandering. *Vieth*, 541 U.S. at 355-68. The first scenario, one sufficient to support a claim, would require Appellants to show that (1) they failed to win a majority of the seats after winning a majority of the votes in two consecutive elections; and (2) that no neutral explanation for this situation exists. Each of Justice Breyer's other scenarios fall further from supporting a claim, but all search for the same thing – "unjustified entrenchment." But the evidence is clear that, if anything, it was the *Democratic* congressional delegation that had been unjustifiably entrenched, and that the Texas Map merely dislodged their entrenchment. Since 1994, or *five* election cycles, Republicans have won a majority of the votes for congress, but until 2004 failed to win a majority of the seats. The Democrats, conversely, have not won a majority of

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[14] The Texas Map is also superior in this regard to the court approved 1996 Texas map that resulted from the Court's decision in *Bush v. Vera*, 517 U.S. 952 (1996).

the Texas congressional vote since 1992, yet they held a majority of the seats until 2004.[15]

II. THE VOTING RIGHTS ACT OF 1965 IS A STATUTORY SHIELD TO PROTECT MINORITY POPULATIONS, NOT A PARTISAN SWORD.

District 23 is represented by Henry Bonilla, a Hispanic Republican. Appellants argue that Mr. Bonilla does not constitute a "candidate of choice" for Hispanic-Americans because he is a Republican. Conversely, Appellants argue that Martin Frost, an Anglo Democrat who represented District 24 under the 2001 map, was a minority candidate of choice . . . because he is a Democrat. These odd results are brought about by Appellants' interpretation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (§ 2) (the "Act"), which says that in order for a congressional district to "perform" for minorities the district must elect a Democrat. Case law, together with the Act's language and legislative history, leave Appellants without support. If Appellants' interpretation of Section 2 is endorsed, the Act's role in protecting and increasing minority participation and access would be undermined. Moreover, interpreted in this manner, the Act's constitutionality would be drawn into question.

Such a theory of partisan-blind racial bloc voting was expressly rejected by Justice White's and Justice O'Connor's concurring opinions in *Thornburg v. Gingles.* 478 U.S. 30, 83 (1986) (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). In fact, the hypothetical set forth in

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[15] *See, e.g.*, MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1508 ("In the U.S. House races, as they have since 1994, Republicans won more votes than Democrats, but fewer seats, thanks to a 1991 Democratic redistricting plan which was closely followed by a court in 2001").

Justice White's concurrence is *virtually identical* to Texas District 23:

> I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did...[16] *Id.* at 83.

Appellants' argument, that in every area where there is a cognizable minority population Section 2 requires districts be drawn so that the minority-*preferred* Democrat usually wins, has also been consistently recognized and rejected by lower courts with the same justification.[17]

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[16] Justice White's opinion is the controlling opinion on this issue. *See Gingles*, 478 U.S. at 83 (White, J., concurring); *id.* at 100-02 (O'Connor, J., concurring in judgment). *See also Uno v. Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) ("[W]hen racial antagonism is not the cause of an electoral defeat suffered by a minority candidate, the defeat does not prove a lack of electoral opportunity but a lack of whatever else it takes to be successful in politics"). Given the Court's ruling on what constituted a cohesive voting group in *Quilter v. Voinovich*, 981 F. Supp. 1032 (N.D.Ohio 1997), *aff'd*, 523 U.S. 1043 (1998), it is questionable whether polarized voting even exists in District 23.

[17] *See, e.g., Hall v. Virginia*, 276 F. Supp. 2d 528, 530 (E.D. Va. 2003), *aff'd*, 385 F.3d 421 (4th Cir. 2004); *Lewis v. Alamance County*, 99 F.3d 600, 617 (4th Cir. 1996); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 382, 386, 401, 403, 427 n.134 (S.D.N.Y. 2004); ("The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates."); *Nixon v. Kent County*, 76 F.3d 1381, 1392 (6th Cir. 1996) (A "group that is too small to be expected to win a seat, were it purely a political group, cannot legitimately have heightened expectations because the basis for the group's existence is tied to the race of its members"); *Baird v. Consol. City of*

Appellants also argue that former District 24 should be protected by Section 2. In short, that minority-majority districts – the method by which the Texas legislature here chose to comply with the Act – actually *violate* Section 2.[18] The record is clear, however, that District 24 was *never* a minority performing district, it was merely a *Democratic* one.[19] Further, the record is clear that the Texas legislature took care to comply with the Act's requirements. For example, a new Hispanic controlled district, District 25, was drawn, and a new Democratic district was created, District 9, that elected an African-American Democrat. All of the other performing minority districts, including Congressman Bonilla's district, were drawn in a manner so that they would continue to elect minority representatives as they had previously. Indeed, the Texas Map enhances minority representation. The prior map had resulted in five Hispanic Democrats, one Hispanic Republican, and two African-American Democrats, being elected – a total of eight. Under the current map, five Hispanic Democrats, three African-American Democrats, and one Hispanic Republican, were elected – for a total of nine. Plus an

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Indianapolis, 976 F.2d 357, 361 (7th Cir. 1992); *see also* Michael A. Carvin and Louis K. Fisher, *A Legislative Task: Why Four Types Of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 12-27 (2005).

[18] Minority-majority districts are districts in which a majority of the voting age population are a racial minority. *See Johnson v. De Grandy*, 512 U.S. 997, 1023 (1994).

[19] The trial record offers the following support for this contention. First, African-Americans constituted only 21.4% of the population in District 24. *See* Joint Appendix, at 51a. Second, Anglos constituted the District's largest ethnic group, and made up a majority of the District's voting age population. Finally, no African-American candidate ever challenged Martin Frost in a Democratic primary, so there is no baseline against which to test Frost's African-American support. *See id.*, at 55a.

additional seat controlled by the Hispanic electorate was created, District 25.

That the Act cannot be used to aid one political party at the expense of another, even if one party is supported by some minority groups, is only further underscored by its legislative history. Resulting from the violence that surrounded efforts in early 1965 to register African-American voters in Selma, Alabama, the Act was clearly meant to address matters of race, not political party affiliation. Indeed, President Lyndon Johnson was focused solely on ending practical barriers to minority voting – which he identified and broke into three categories: (1) technical, (*e.g.*, poll taxes) (2) non-cooperation, and (3) subjective (*e.g.*, literacy tests). *See* MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATED TO THE RIGHT TO VOTE, 89th Cong. (1st Sess. 1965). This singular focus on ending the practical barriers to voting faced by minorities is further demonstrated by President Johnson's speech to a special joint-session of Congress concerning the Act, in which he stated:

> The issue of equal rights of American Negroes is [a challenge to the values and purposes of America.] And should we defeat every enemy, and should we double our wealth and conquer the stars and still be unequal to this issue, then we will have failed as a nation. And we meet here tonight *as* Americans – *not as Democrats or Republicans* – we are met here as Americans to solve that problem.[20] *Id.* (emphasis added).

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[20] In this same statement, President Johnson goes so far as to name legislators from both parties in calling for the Act's passage: "[a]nd so at the request of your beloved Speaker and Senator from Montana, the Majority Leader, Mr. Mansfield, and the Senator from Illinois, the Minority Leader, Mr. Dirksen, and Mr. McCullouch and others, Members of both parties…I come here to ask you to share this task with me and to share it with the people we both work for." MESSAGE FROM THE PRESIDENT OF THE UNITED STATES RELATED TO THE RIGHT TO VOTE, 89th Cong. (1st Sess. 1965).

The Act's legislative history, saturated with discussion about ending barriers to minority voting, is virtually absent of any reference to political party representation. Indeed, the legislative history expressly disclaims congressional intent to establish any right to have members of even protected classes elected in numbers equal to their proportion in the population.[21] In fact, "it was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to

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[21] It is abundantly clear that "during the hearings, a unanimous consensus was established, among both the opponents and proponents of the results test, that the test for Section 2 claims should not be whether members of a protected class have achieved proportional representation." S. REP. NO. 97-417, at 193 (1982) (additional views of Senator Robert Dole), *as reprinted in* 1982 U.S.C.C.A.N. 177, 364. This is so because "[t]he fifteenth amendment and the Voting Rights Act of 1965 protect voter access only. . . . Neither the Amendment nor Section 2 of the Act explicitly or impliedly asserts that the voter is entitled to any additional rights or privileges after his vote has been taken, or that the outcome or result of the election with respect to the success or failure of minority candidates bears any relation to an individual's right to vote. . . . Why? Because the right to vote is an individual right of equal access to the ballot, not the collective right of a particular [group] to a certain share of elected officials after each individual has exercised his right to vote and gone home." S. REP. NO. 97-417, at 221-22 (1982) (minority views of Senator John P. East), *as reprinted in* 1982 U.S.C.C.A.N. 177, 391-92; *see also id.* at 28 (Judiciary Committee Report), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206 ("Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy."); *id.* at 16 (Judiciary Committee Report), as reprinted in 1982 U.S.C.C.A.N. 177, 193 ("[T]he Committee has amended Section 2 to permit plaintiffs to prove violations by showing that minority voters were denied an equal chance to participate in the political process"); *accord* H.R. REP. NO. 97-227, at 30 (1981) ("The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.").

their voting potential was repugnant to the democratic principles upon which our society is based. Citizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress." S. REP. NO. 97-417, at 193 (1982) (additional views of Senator Robert Dole), *as reprinted in* 1982 U.S.C.C.A.N. 177, 364.

Finally, to argue that elected Republicans would play such an integral role in legislation designed to elect more Democrats defies common sense. The Act itself, it is widely acknowledged, was *drafted* in Senator Everett Dirksen's office, the Republican Senate Minority Leader from Illinois.[22] One historian describes the Republican Senator's role as follows:

> The Civil Rights Acts of the 1960s were [Dirksen's] Acts. He did more than sponsor them. He did more even than produce the necessary votes to enact them. He also did what few of his colleagues were capable of doing: he played the principal role in drafting their language, and *thus determined their exact legislative thrust and intent.* NEIL MACNEIL, DIRKSEN: PORTRAIT OF A PUBLIC MAN 4 (The World Pub. Co. 1970) (emphasis added).

It is hard to imagine that Senator Dirksen intended for the Act to benefit his opposing political party. Indeed, by one

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[22] Not only did Senator Dirksen play a large role in the Act's drafting, but he actively lobbied his colleagues to support it. *See* BYRON C. HULSEY, EVERETT DIRKSEN AND HIS PRESIDENTS: HOW A SENATE GIANT SHAPED AMERICAN POLITICS 210-11 (Univ. Press of Kansas 2000) ("Legislative aides and lawyers from the Justice Department gathered daily in Dirksen's office to draft the legislation. At the close of every day Dirksen would return from the Senate floor and ask, 'well, boys, what have you done today?' After he was briefed, he would open up the bar, and when one or two conservative Republicans stopped by for a drink, the lawyers from Justice had a chance to lobby for the bill").

account, in a conversation with his Republican Senate colleagues Senator Dirksen stated: "Republican senators [will] have to assume leadership because the Democrats [will] not do so." BYRON C. HULSEY, EVERETT DIRKSEN AND HIS PRESIDENTS: HOW A SENATE GIANT SHAPED AMERICAN POLITICS 210-11 (Univ. Press of Kansas 2000). The Act is not a partisan tool. There is no reason for the Court to depart from the meaning given to the Act by Congress and the courts – the protection of racial minorities.

CONCLUSION

For the reasons set forth above, *amicus* RNC urges the Court to affirm the District Court decision.

Respectfully submitted,

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In The
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICI CURIAE* SPEAKER OF THE GEORGIA HOUSE OF REPRESENTATIVES GLENN RICHARDSON; SPEAKER PRO TEMPORE OF THE GEORGIA STATE SENATE ERIC JOHNSON; HOUSE MAJORITY LEADER JERRY KEEN; SENATE MAJORITY LEADER TOMMIE WILLIAMS; AND SENATOR CHIP ROGERS AND REPRESENTATIVE BOBBY FRANKLIN, CHAIRMEN OF THE REAPPORTIONMENT COMMITTEES OF THE GEORGIA GENERAL ASSEMBLY IN SUPPORT OF APPELLEES

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GI FORUM OF TEXAS, *et al.*,

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QUESTIONS PRESENTED

Does the Constitution require federal court-ordered redistricting plans to remain in effect during an entire decade, foreclosing all subsequent redistricting legislation enacted by the Legislature?

Does the Constitution restrict the redistricting authority of state legislatures to one time per decade, thereby mandating the use of the first-passed plan for the entire decade and prohibiting state legislatures from remedying gross partisan gerrymandering that exists in the plan?

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STATEMENT OF INTERESTS OF *AMICI CURIAE*

The *Amici Curiae* are the Speaker of the Georgia House of Representatives Glenn Richardson; the President Pro Tempore of the Georgia State Senate Eric Johnson; the Majority Leader in the Georgia House of Representatives, Jerry Keen; the Majority Leader in the Georgia State Senate, Tommie Williams; the Chairman of the Legislative and Congressional Reapportionment Committee of the Georgia House of Representatives, Bobby Franklin; and the Chairman of the Reapportionment and Redistricting Committee of the Georgia Senate, Chip Rogers ("the Georgia Legislative *Amici*").[1] The Georgia Legislative *Amici* led the 2005 effort in the Georgia General Assembly to redraw Georgia's 2001 Congressional Plan, which represented one of the worst and most blatant partisan gerrymanders of the decade. *See* App. 1. As a result, the 2005 Georgia General Assembly enacted a Congressional redistricting plan which eliminated the 2001 gerrymander and provided a rational Congressional plan for the remainder of the decade ("the 2005 Congressional Plan"). *See* App. 2.

The Georgia Legislative *Amici* submit this brief because they are concerned that the severe restriction on redistricting urged by Appellants, if accepted, would unconstitutionally impinge upon the right and obligations

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[1] As required by Rule 37.3(a) of this Court, *Amici Curiae* have sought and received the written consent of all parties to file this brief presented. Copies of letters of consent signed by counsel are filed herewith with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *Amici Curiae* state that none of the parties authored this brief in whole or in part, and no person or entity, other than the *Amici Curiae* or their counsel, made a monetary contribution to the preparation or submission of the brief.

of state legislatures. The Georgia Legislative *Amici* seek to ensure that the Georgia General Assembly continues to be able to exercise its redistricting power both (1) after the imposition of federal court-ordered plans specifically and (2) during the decade generally.

SUMMARY OF ARGUMENT

This Court should reject Appellants' argument that state legislatures are limited to one redistricting plan per decade, whether court-ordered or legislatively-enacted. Neither the Constitution nor this Court's jurisprudence provides any support for the imposition of such restrictions on the redistricting power and authority of state legislatures.

As an initial matter, the existence of a court-ordered plan does not strip a legislature of its prerogative to enact a redistricting plan. To the contrary, in implementing plans, courts consistently provide opportunities for legislatures to act first, impose plans with great reluctance and make clear that the plans are interim, *i.e.*, in effect until legislatures replace them with another valid plan.

Legislatures are also free to change their own plans throughout the decade, as long as the new plan meets constitutional and statutory requirements. In Georgia, the redistricting process has historically gone on throughout the decade, with the General Assembly revising various districts as it deems appropriate.

Appellants' framework, however, would limit the states to one redistricting plan for the decade, whether drawn by a court or the legislature. Appellants initially

appear to restrict the limitation they urge to mid-decade redistricting when the same is done "for the sole purpose of maximizing partisan advantage," Appellants' Brief at 17. However, application of the rule urged by Appellants – coupled with their argument invoking the constitutional guarantee of one person, one vote – makes clear that the relief Appellants espouse would ultimately result in a blanket prohibition against mid-decade redistricting.

In its application, Appellants' argument would exempt from scrutiny the original redistricting plan enacted after the Decennial Census ("the Census") because such a plan would always have as one of its purposes the equalization of population; therefore, Appellants reason, the original plan could never be described as having been implemented solely for the purpose of maximizing partisan advantage. As a result, even a blatant partisan gerrymander, such as the one passed by the Georgia General Assembly in 2001, *see* App. 1, would be acceptable under Appellants' rule because, as the first plan implemented after the Census, it could not have had as its sole purpose the maximization of political power. In essence, legislatures would be given a free pass to gerrymander during the first redistricting after the Census.

Then, however, future legislatures would be forever foreclosed from remedying that gerrymander during the decade. Appellants may argue that future legislatures would only be foreclosed if the sole purpose of their later redistricting were to maximize partisan advantage. Dismantling a gross partisan gerrymander, by definition, weakens the partisan advantage of the gerrymandering party. Under Appellants' theory, the Georgia General Assembly would have been prohibited from enacting its 2005 Congressional redistricting plan, which, rather than

being a gross partisan gerrymander, *eliminated* the gross partisan gerrymander enacted in 2001, *see* App. 2.

Thus, examining the application of Appellants' theory demonstrates that Appellants' aim is to eliminate mid-decade redistricting. That objective is made even clearer by the argument of Appellants and the University Professors *Amici* that the use of Census numbers in mid-decade redistricting violates the constitutional principle of one person, one vote because the Census numbers are several years old. Because redistricting practically cannot be based on any other numbers, the argument of Appellants and the University Professors *Amici* against the use of Census numbers in mid-decade redistricting is another way of arguing against mid-decade redistricting at all.

Although Appellants' political purposes in this particular instance might be served by the result they urge, there is no constitutional basis for the limitation on the authority of the state legislatures they espouse. Furthermore, in application, such a limitation will likely result in gross partisan gerrymanders, drawn the first year of a decade, that can never be reversed. For those reasons, the Court should affirm the court below.

ARGUMENT

I. THE IMPOSITION OF A COURT-ORDERED REDISTRICTING PLAN DOES NOT OPERATE AS A WAIVER BY THE STATE OF ITS AUTHORITY TO REDISTRICT UNDER ART. I, § 4 AND CONSEQUENTLY DOES NOT PREEMPT A STATE LEGISLATURE FROM ENACTING SUBSEQUENT REDISTRICTING PLANS

The existence of a court-ordered redistricting plan in this case did not, as Appellants suggest, prohibit the Texas legislature from enacting a new plan. As discussed above, the drawing of redistricting plans is the responsibility of the state legislature. U.S. CONST., Art. I, § 4; *Branch v. Smith*, 538 U.S. 254, 261 (2003); *Growe v. Emison*, 507 U.S. 25, 34 (1993); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). The imposition of a court-drawn plan does not effectively operate as a waiver of the state's authority to redistrict.

To the contrary, court-ordered plans are inherently interim solutions, implemented only when a legislature fails to draw a plan or the plan enacted by a legislature is struck down by the court. *See, e.g., Growe*, 507 U.S. at 34; *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982); *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *Larios v. Cox*, 306 F. Supp. 2d 1212, 1213 (N.D.Ga. 2004). Before imposing a plan, a court will provide the state legislature every opportunity to enact a plan. *See, e.g., Larios*, 306 F. Supp. 2d at 1214 ("the court continues to encourage the enactment of reapportionment maps by the General Assembly of Georgia, which is now in session. We are aware that members have been working on and considering such legislation. Nothing in this order or any previous order of this court is intended to prevent or forestall the General Assembly and the Governor from

considering and enacting reapportionment plans after March 1, 2004, resolving the issues in this case. Nor should this court's orders be construed in any way as to discourage such a resolution of this matter.").

More importantly, if the court must devise and impose a reapportionment plan, it does so "'pending later legislative action.'" *Larios*, 314 F. Supp. 2d 1357, 1360 (N.D.Ga. 2004), *quoting Wise*, 437 U.S. at 540 and *Connor v. Finch*, 431 U.S. 407, 415 (1977). Thus, the existence of a court-ordered interim plan does not bar later legislative action but rather presumes it.

II. THERE IS NO FEDERAL CONSTITUTIONAL OR STATUTORY LIMITATION ON THE AUTHORITY OF STATE LEGISLATURES TO REDISTRICT MORE THAN ONE TIME AFTER THE DECENNIAL CENSUS

Just as a court-ordered plan does not preempt later action by the legislature neither does the legislature's own action bar its later redistricting efforts. Absent a state constitutional or statutory provision prohibiting the legislature from enacting redistricting plans subsequent to one first implemented each decade, the legislature is free to enact new redistricting plans throughout the decade.

Federal law does not provide otherwise. In a 1964 Georgia case, *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court established that, at a minimum, a state must redistrict following the Census. That same year, in *Reynolds v. Sims*, 377 U.S. 533 (1964) this Court reiterated that a legislature's failure to redistrict once after release of the Census was "constitutionally suspect." *Reynolds,* at 583-84.

However, there is no law that supports Appellants' conclusion that the constitutionally-required minimum number of redistricting plans in a decade – one – is also the maximum allowable. As the Ninth Circuit concluded in *Garza v. County of Los Angeles*, 918 F.2d 763, 772 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991): "*Reynolds* did not institute a constitutional maximum frequency for reapportionment; rather, it set a floor below which such frequency may not constitutionally fall."

Without limitation, Art. I, § 4 of the United States Constitution vests in the state legislatures the power to draw their Congressional districts; there is no limit on the number of times a state legislature may redistrict. Likewise, although Congress has reserved to itself the power to regulate the time, place and manner of Congressional elections, 2 U.S.C. §§ 2a & 2c (2005), it has not restricted the number of times a state legislature may redistrict.

In short, a reading of the plain language of both federal constitutional and statutory provisions demonstrates that there is no limit on the number of redistricting plans that a state may implement during a decade. Likewise, a review of federal caselaw demonstrates that that redistricting plans may be amended throughout the decade. *Reynolds,* at 583-84; *Daly v. Hunt*, 93 F.3d 1212, 1228 n.15 (4th Cir. 1996); *Garza,* 918 F.2d at 772; *Johnson v. Mortham*, 926 F. Supp. 1460, 1494 (N.D.Fla. 1996) ("*Johnson II*") (three-judge panel), *aff'd sub nom.*, *Johnson v. Smith*, 132 F.3d 1460 (11th Cir. 1997).

While some states impose restrictions upon the frequency of redistricting, the majority have not chosen to do so. In Georgia, for example, the General Assembly is not constrained by constitutional or statutory law with

respect to the number of times redistricting plans may be amended in the course of a decade, and redistricting plans have routinely been amended throughout the decade.

III. PROHIBITING REDISTRICTING MORE THAN ONCE A DECADE WILL PERMIT EGREGIOUS PARTISAN GERRYMANDERING IN THE ORIGINAL REDISTRICTING PLAN AND FORECLOSE ANY EFFORT TO REMEDY THAT PLAN FOR AN ENTIRE DECADE

Using Appellants' theory, the gross partisan gerrymander enacted by the Georgia General Assembly in 2001, *see* App. 1, would have been irrevocable. As the first plan enacted following the Census, Appellants would argue that the Georgia plan was immune from a partisan gerrymander attack because as it was enacted after the Census and ostensibly for the purpose of equalizing population, its "sole purpose" could not have been the maximization of partisan advantage.

In fact, even a cursory review of Georgia's 2001 Congressional redistricting plan demonstrates that the maximization of partisan advantage was the sole purpose of the plan; the fact that the Census had been released and the districts' populations needed to be equalized was a happy coincidence. Looking at the 2001 plan first as a whole, App. 1, and then by individual district, App. 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, there can be no doubt that the districts were grossly gerrymandered for political purposes. Absent the General Assembly's ability to redistrict again, Georgia voters would have been locked into a Congressional redistricting plan in which "districts" bore no semblance to a reasonable definition of that word.

Contrary to Appellants' fears, the Georgia General Assembly's mid-decade redistricting did not result in a partisan gerrymander. Instead, the legislature employed traditional redistricting criteria which had been used in Georgia Congressional plans prior to the 2001 plan – keeping counties whole, achieving true contiguity (rather than point contiguity) and compactness,[2] honoring the traditional cores of districts – and complied with the requirements of one person, one vote

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[2] A comparison of the compactness measurements between the 2001 and 2005 districts shows a marked improvement in the 2005 plan. The change in the results of perimeter test, which measures the total distance around a district by measuring the line distance, demonstrates how contorted the districts were in the 2001 plan. By eliminating the numerous subdivision splits and meandering jagged boundaries, the 2005 General Assembly substantially reduced the attenuated 2001 geographic boundaries by a factor of more than one-third (8695-5589=3106; 3106/8693=36%). Likewise, the scores improved under the Polsby-Popper test, which deems districts closer to 1 more compact and closer to 0 less compact.

2001 District Number	2001 District Number	2001 District Number	2001 District Number	2001 District Number	2001 District Number
001	001	1106.76	0.12	763.77	0.26
002	002	697.12	0.26	692.98	0.29
008	003	1054.98	0.04	495.02	0.21
004	004	112.97	0.25	135.93	0.23
005	005	188.24	0.09	108.48	0.26
006	006	211.99	0.12	173.88	0.29
007	007	480.31	0.07	227.78	0.24
003	008	949.72	0.15	713.98	0.18
010	009	487.17	0.2	371.31	0.4
009	010	872.07	0.12	614.32	0.2
011	011	1167.02	0.03	306.4	0.36
012	012	770.7	0.11	738.29	0.2
013	013	596.3	0.03	246.75	0.12
Sum	Sum	8695.35	N/A	5588.89	N/A
Min	Min	N/A	0.03	N/A	0.12
Max	Max	N/A	0.26	N/A	0.4
Mean	Mean	N/A	0.122308	N/A	0.249231
Std. Dev.	Std. Dev.	N/A	0.076284	N/A	0.074662

and Sections 2 and 5 of the Voting Rights Act, 42 U.S.C. § 1971 et seq. In doing so, the General Assembly succeeded in creating a Congressional plan comprised of actual districts rather than pieces of geography strung together for partisan purposes. App. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28.

In eliminating the contorted districts and returning cognizable districts to the voters, the Republican-controlled 2005 Georgia General Assembly did not simultaneously engage in the maximization of partisan advantage, as demonstrated by the following chart. Using the Bush vote in the 2000 election as its measurement, the chart shows a noticeable lack of an effort to grab partisan advantage:

Member	District 2001 Plan	District 2005 Plan	% Bush 2001 Plan	% Bush 2005 Plan	Change in Bush%, 2001 to 2005 Plans
Kingston	1	1	64.5-R	62.4-R	-2.1
Bishop	2	2	51.0-R	47.6-D	-3.4
Westmoreland	8	3	70.1-R	67.0-R	-3.1
McKinney	4	4	29.3-D	29.9-D	+0.6
Lewis	5	5	28.9-D	27.2-D	-1.7
Price	6	6	69.2-R	68.2-R	-1.0
Linder	7	7	72.0-R	69.2-R	-2.8
Marshall	3	8	52.5-R	58.1-R	+5.6
Deal	10	9	71.2-R	71.0-R	-0.2
Norwood	9	10	67.8-R	62.8-R	-5.0
Gingrey	11	11	52.2-R	65.4-R	+13.2
Barrow	12	12	45.7-D	47.8-D	+2.1
Scott	13	13	42.0-D	43.3-D	+1.3

As a result of the new plan, there are only two districts in which the change in the 2000 Bush vote was greater than 5 percentage points. However, in the 2001 plan, both districts had previously been painfully contorted specifically to avoid a Republican district. *See* App. 17, 23. When the districts took on truly compact and contiguous shapes, the political performance numbers more accurately reflected the existing partisan strength. *See* App. 8, 24.

In summary, the ability to redistrict during the decade actually allowed the Georgia General Assembly to correct the gross partisan gerrymander that was the 2001 Georgia Congressional plan. Without such authority, the Georgia General Assembly would have had no ability to remediate Georgia's grossly gerrymandered 2001 Congressional districts and replace them with reasonable districts that provide fair representation to all Georgians. Mid-decade redistricting does not, as Appellants suggest, always result in partisan gerrymandering. Sometimes it cures it.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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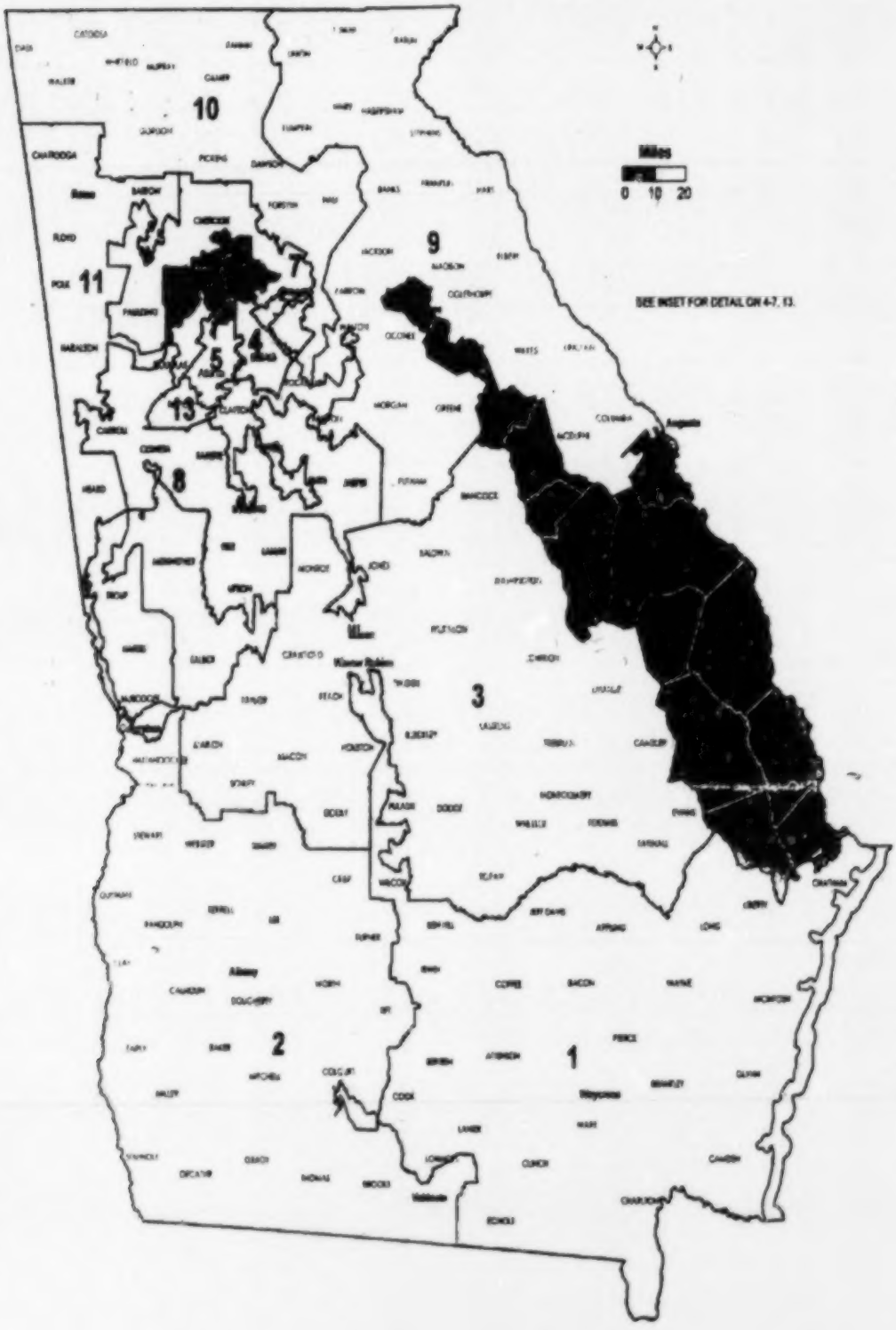
February 1, 2006

Georgia

Congressional Districts for 2002-2004 elections.

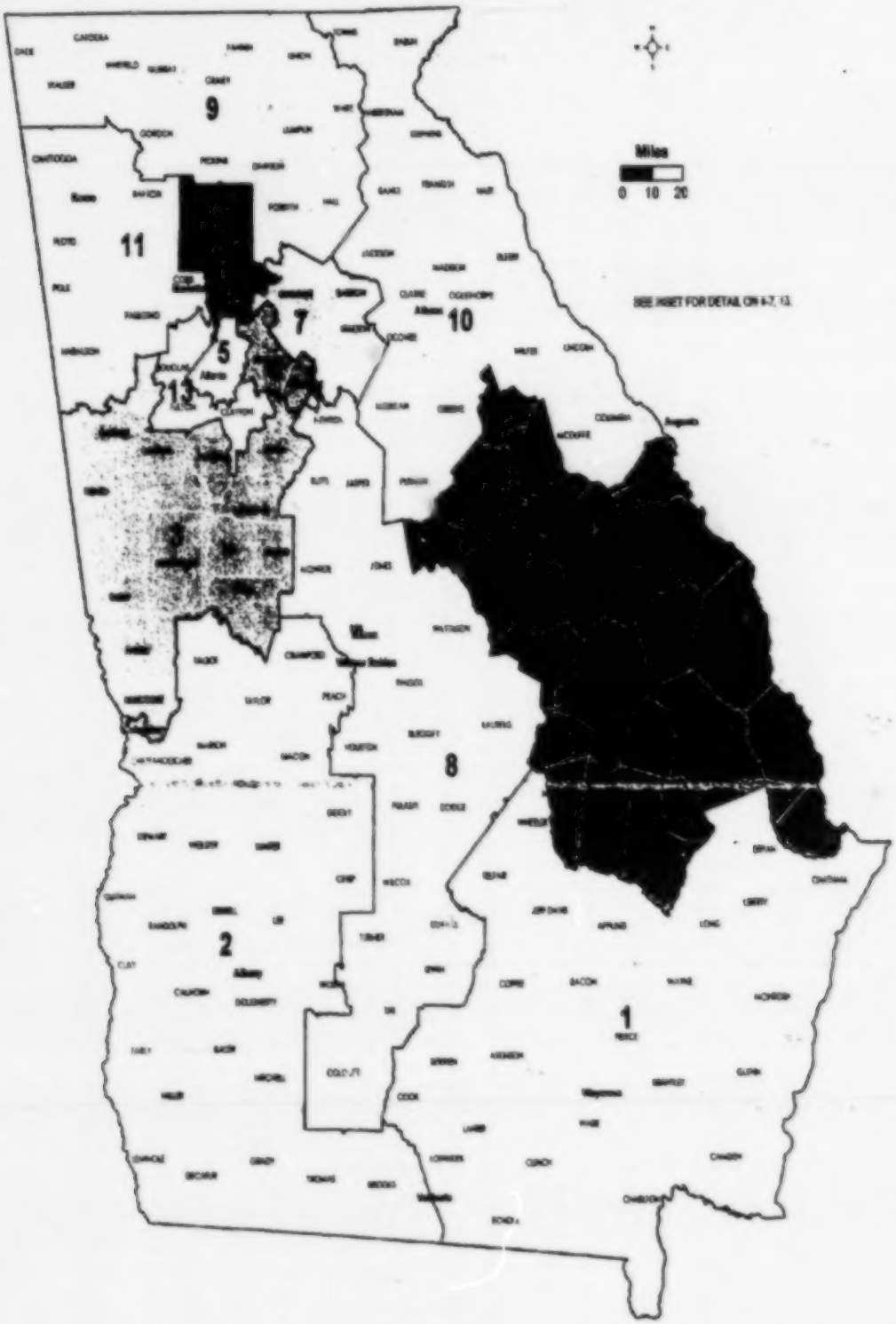


Congressional district boundaries are effective for the 2002 elections

App. 1

Georgia

Congressional Districts for 2006-2010 elections.



Congressional district boundaries first effective for the 2006 elections.

App. 2

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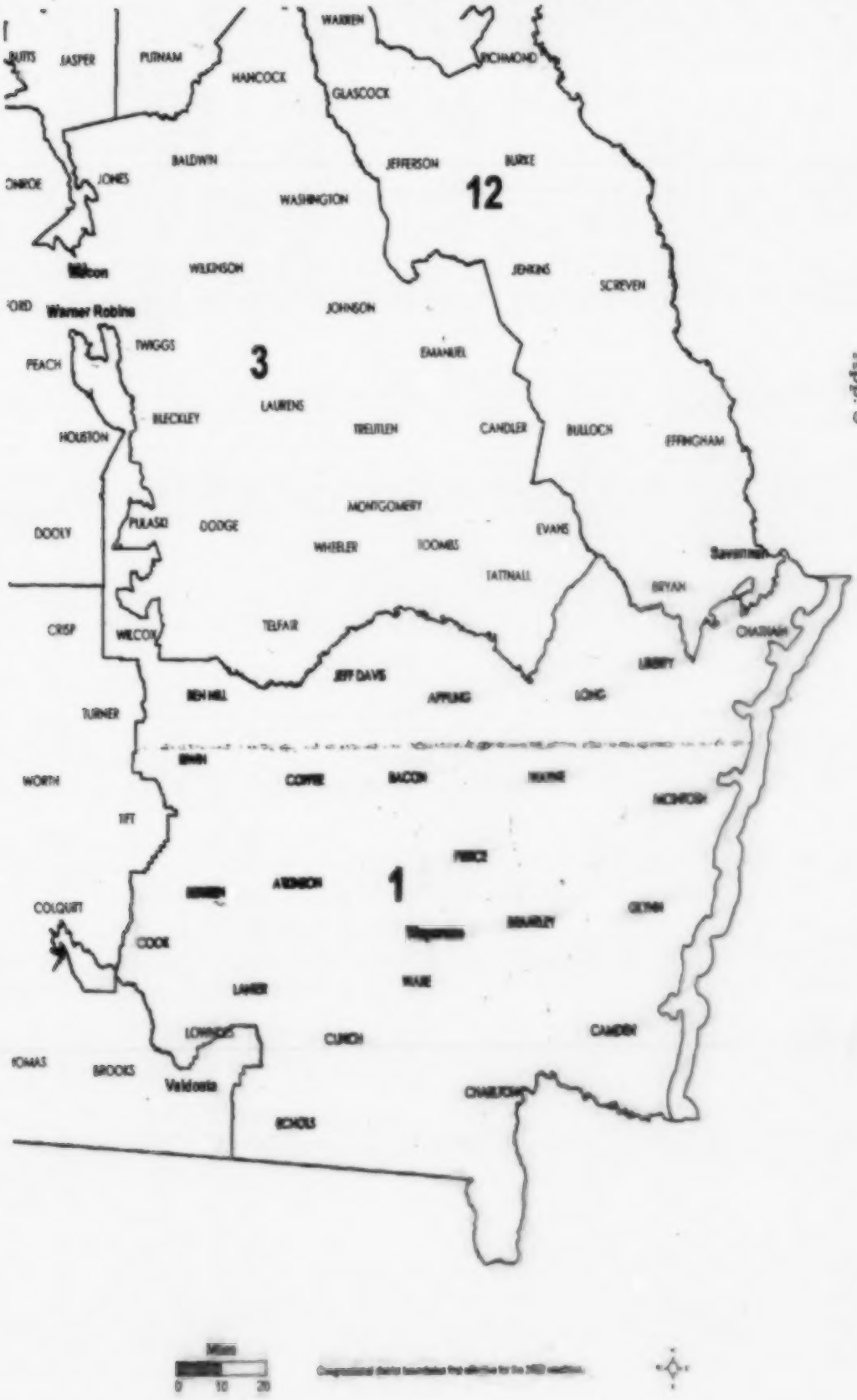
Congressional Districts for 2002-2004 elections.



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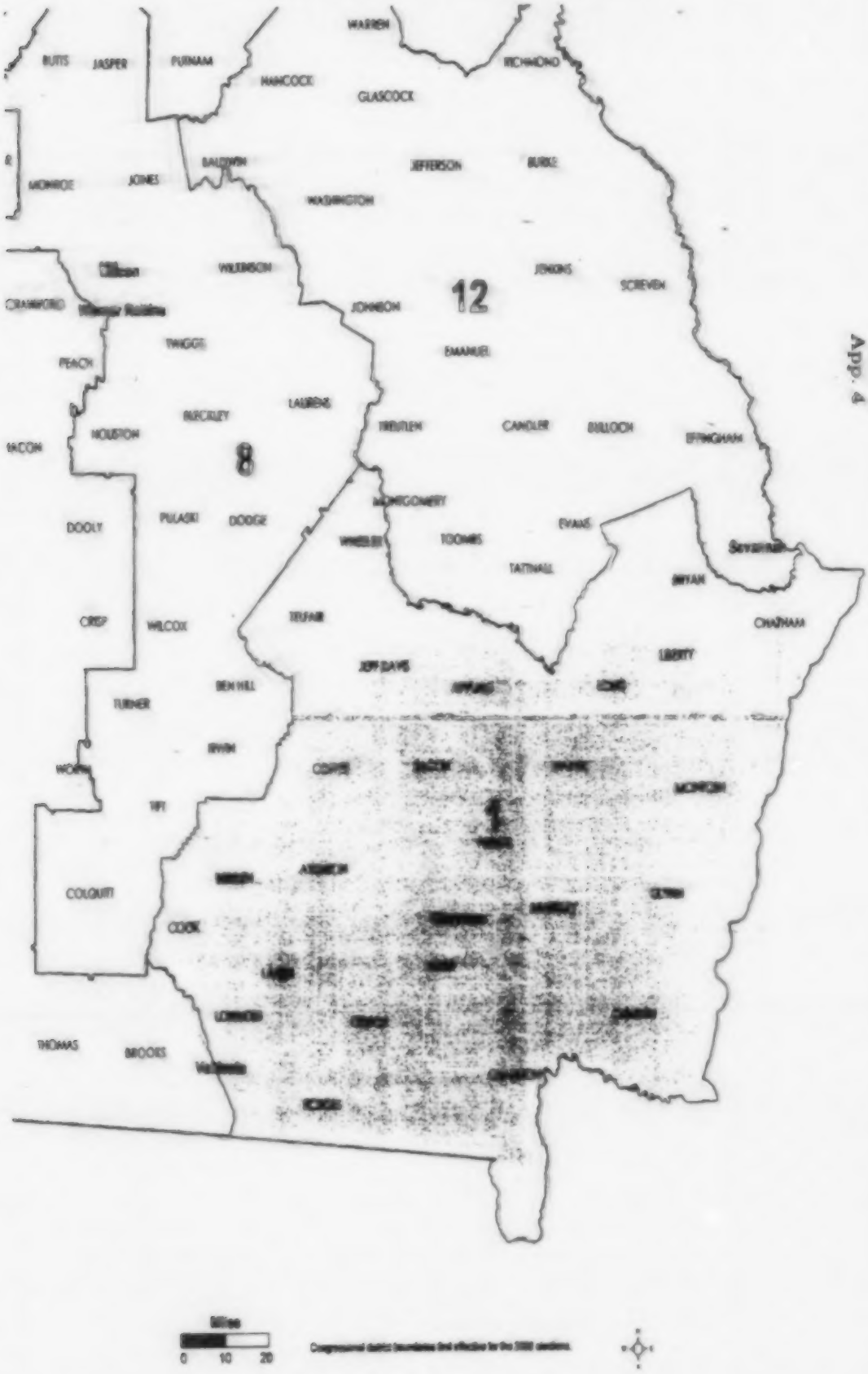

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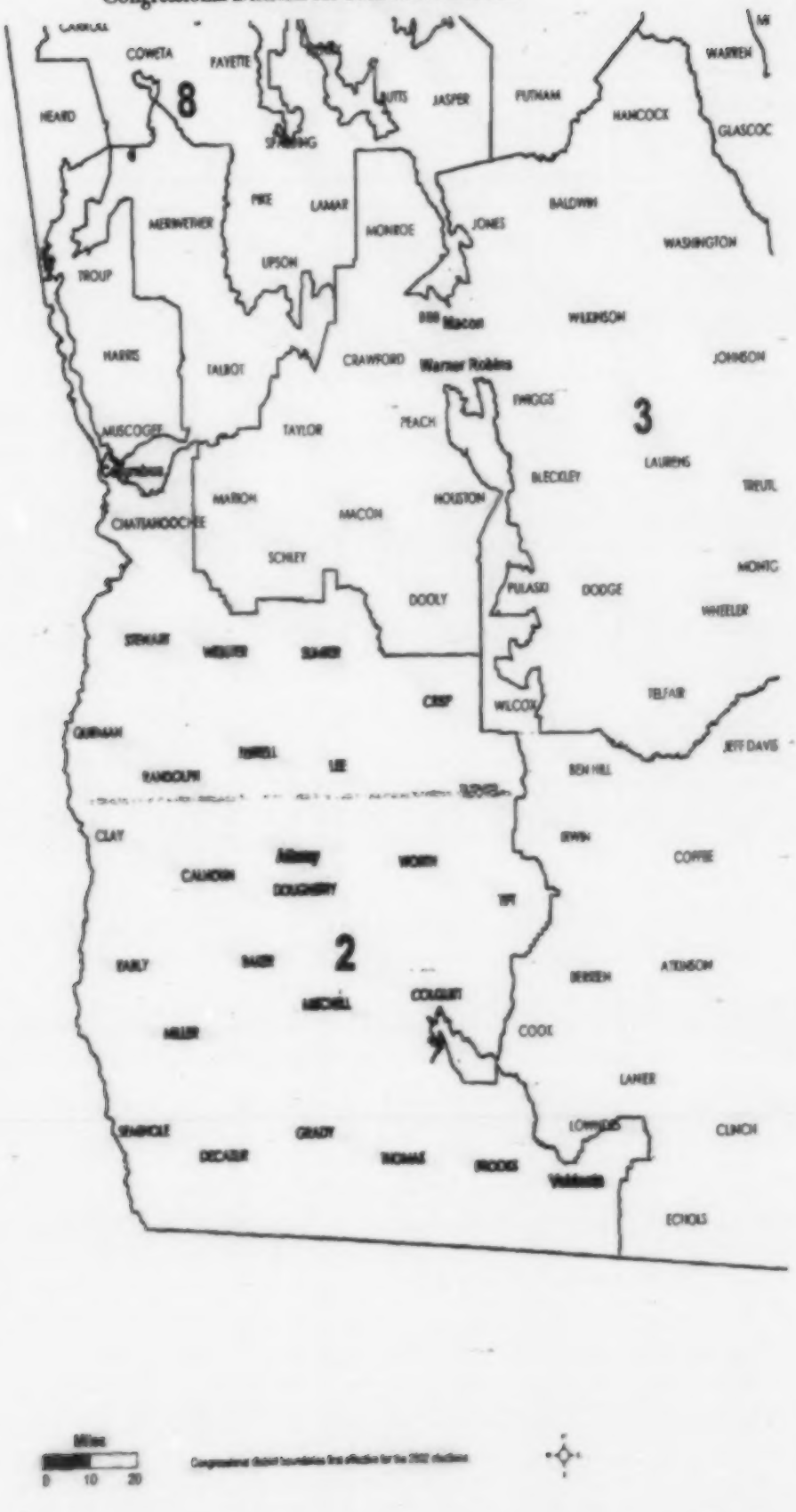

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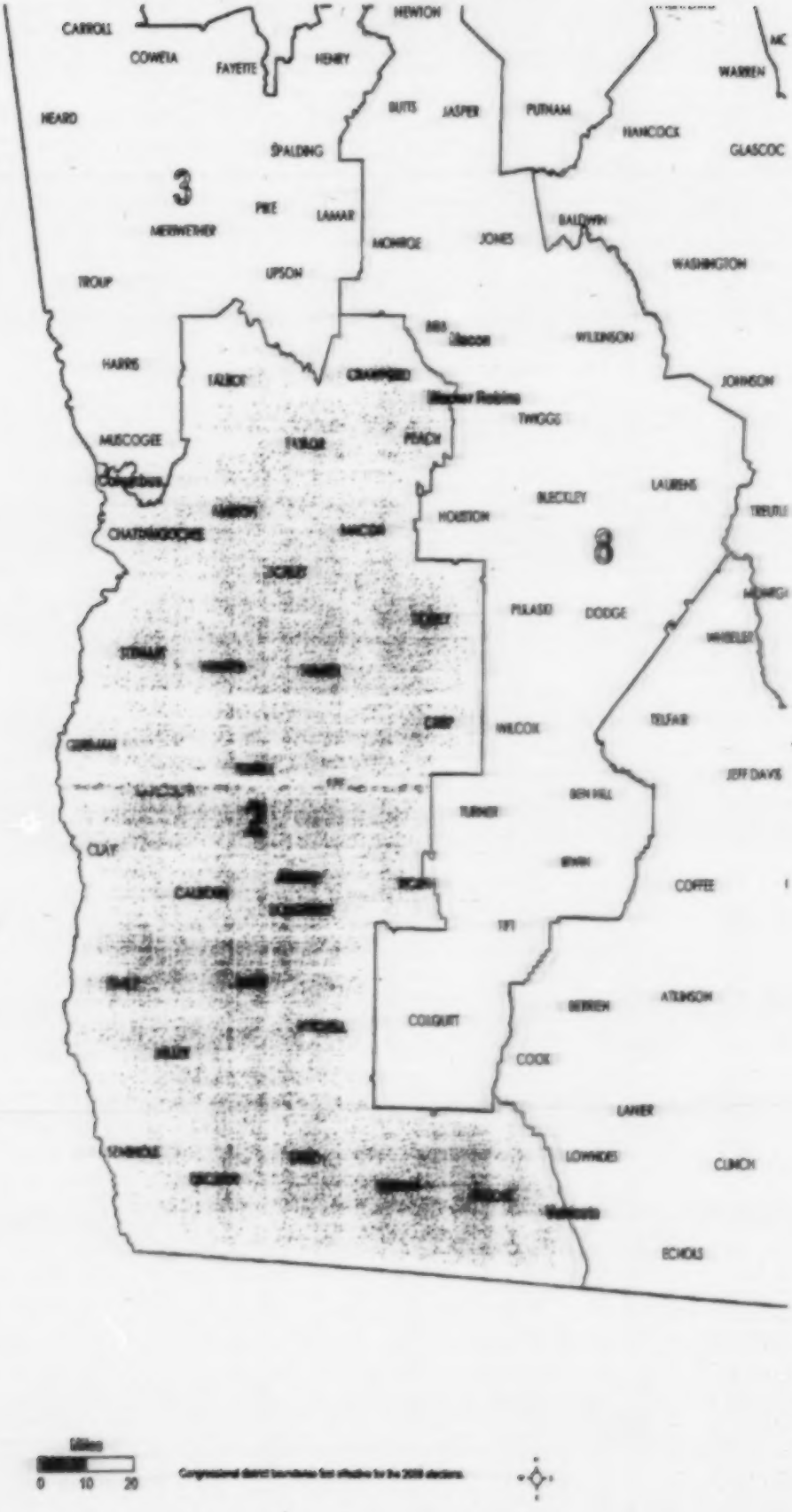

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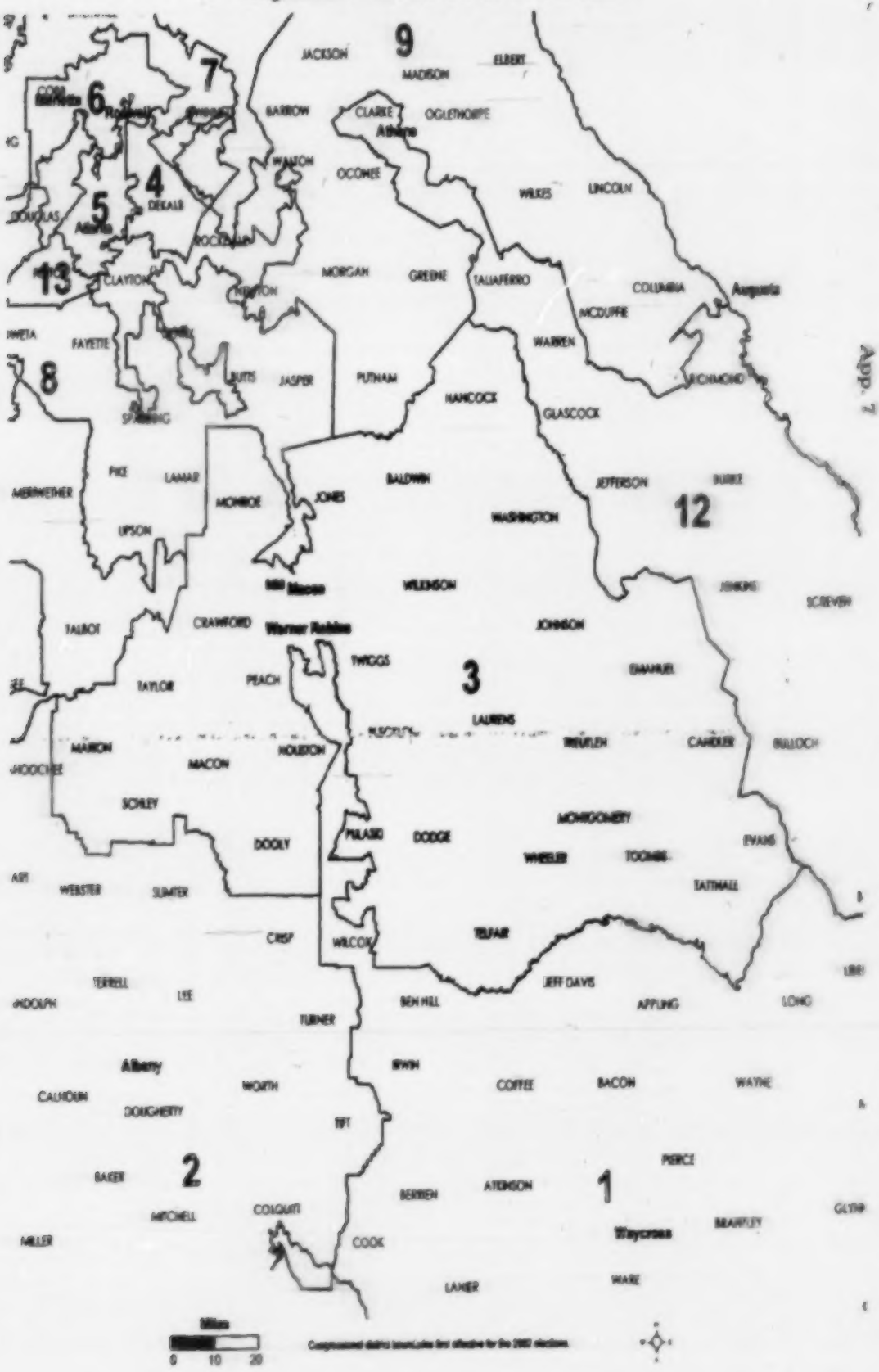

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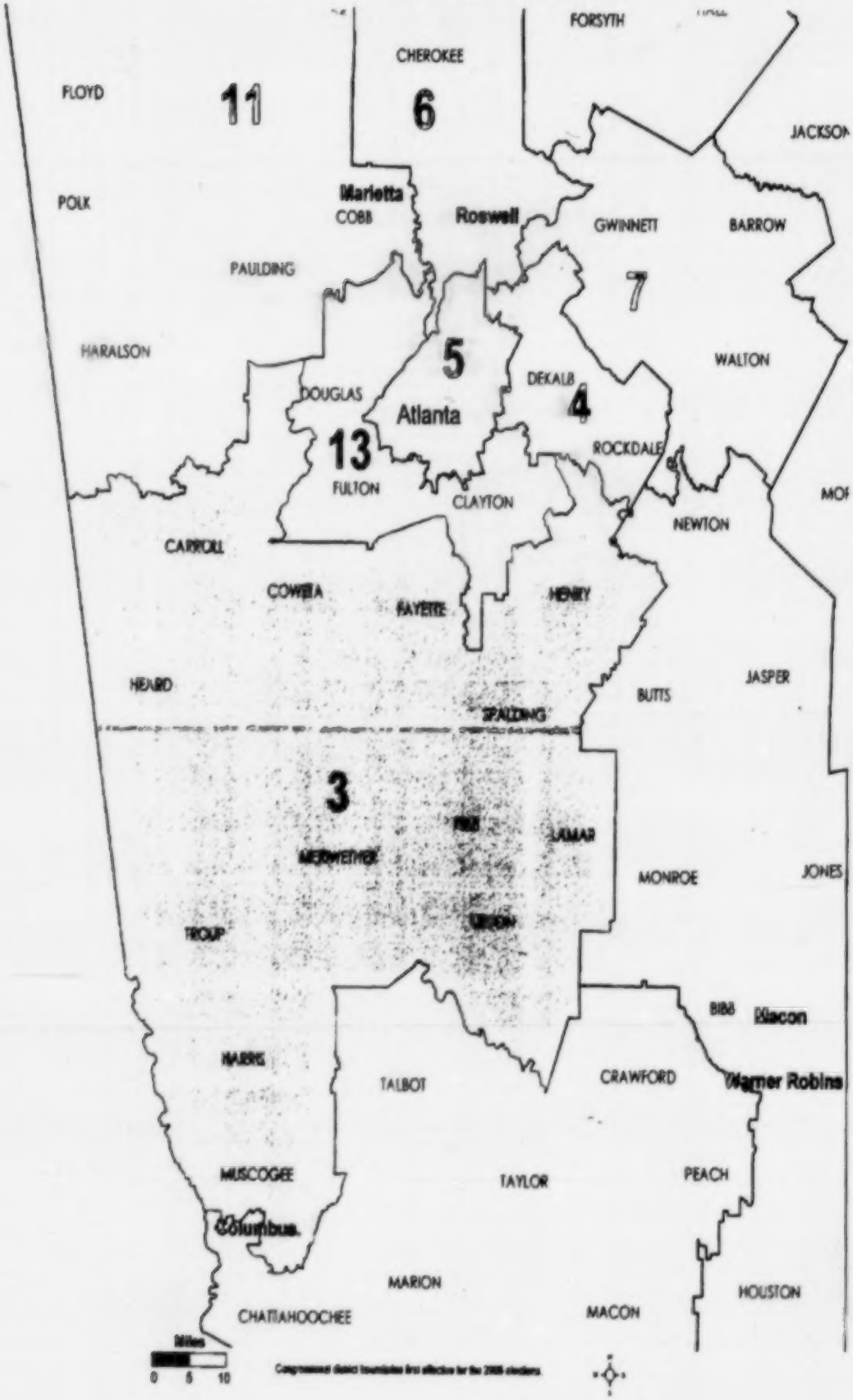
Congressional Districts for 2006-2010 elections.



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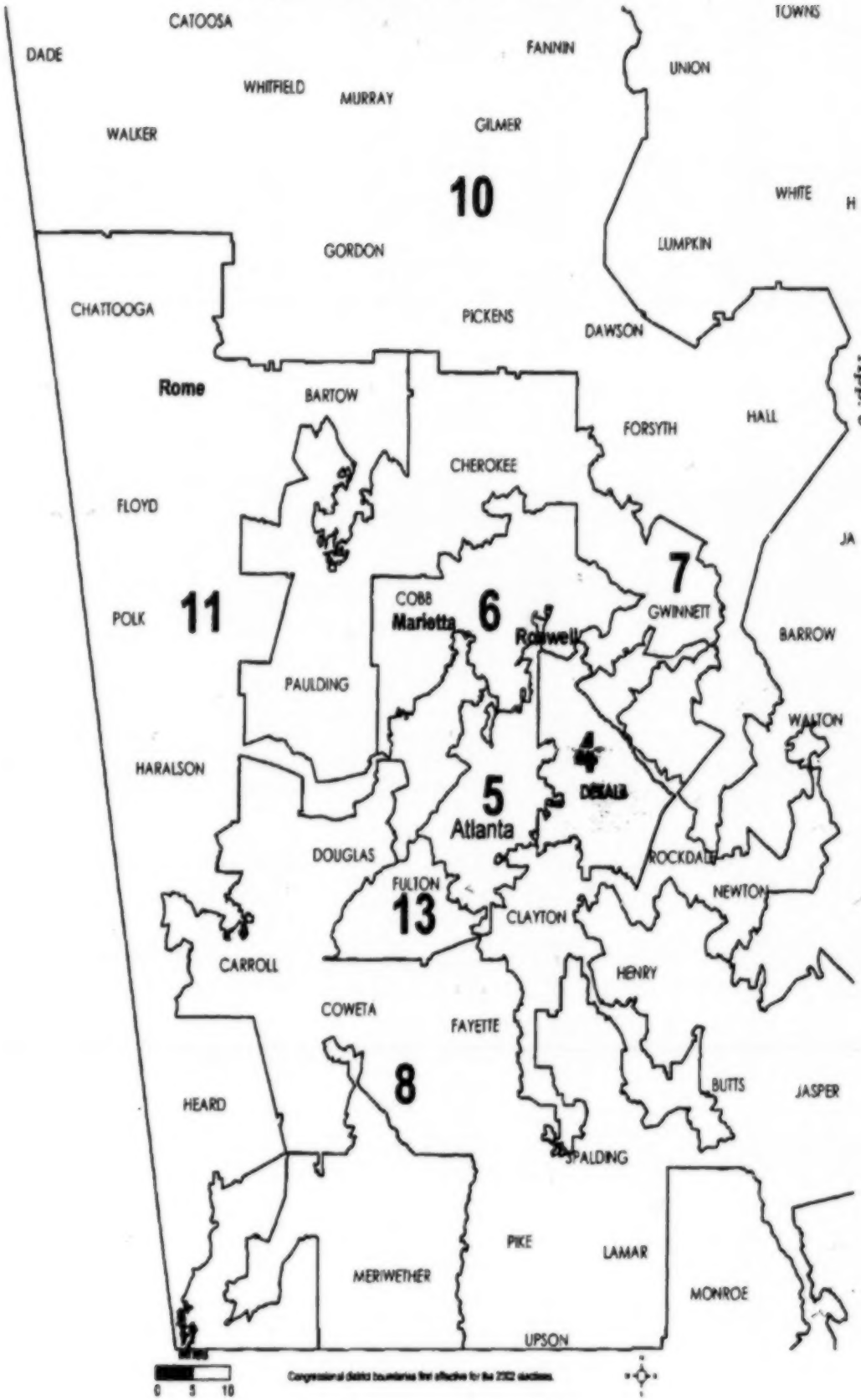
Congressional Districts for 2002-2004 elections.



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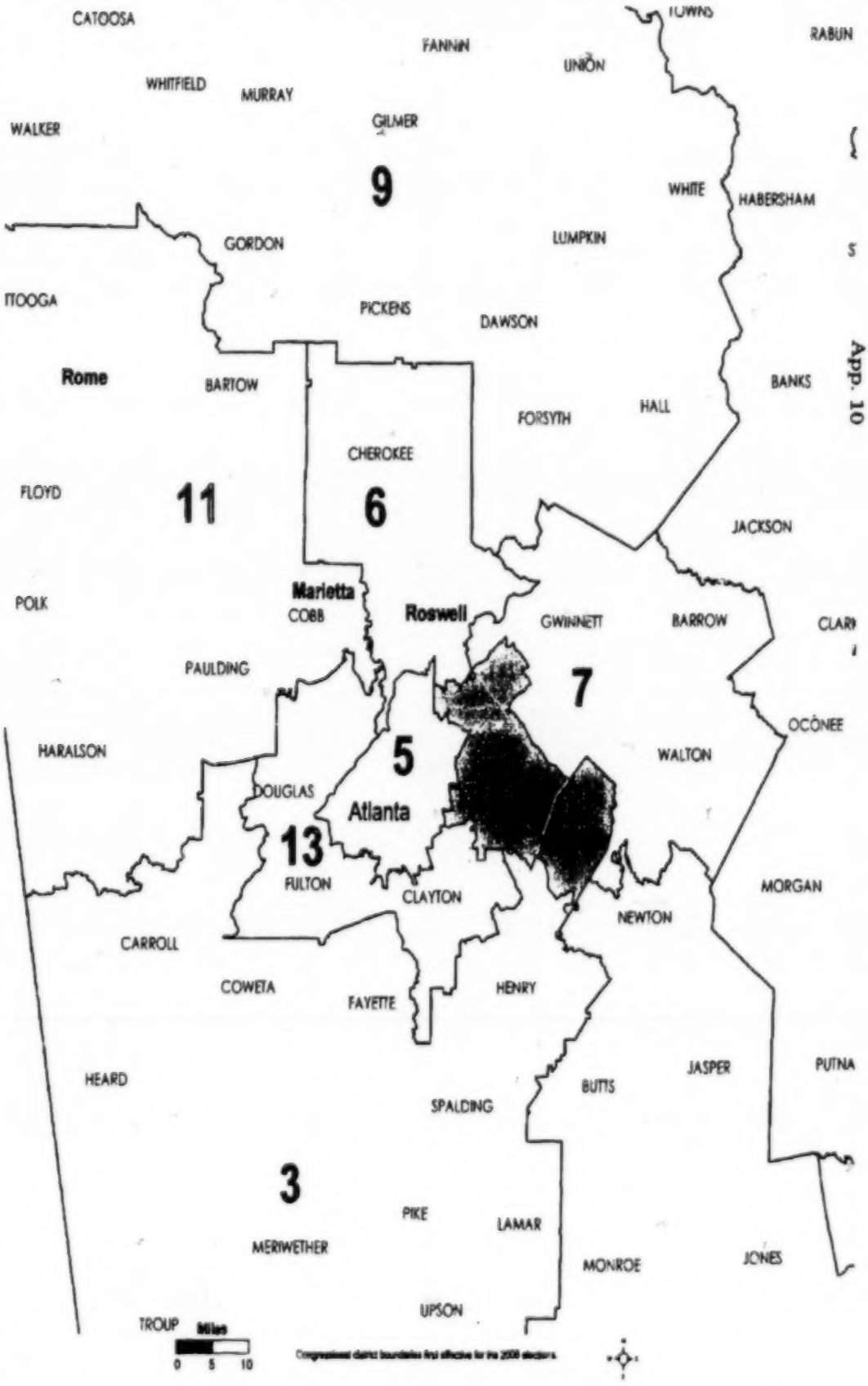

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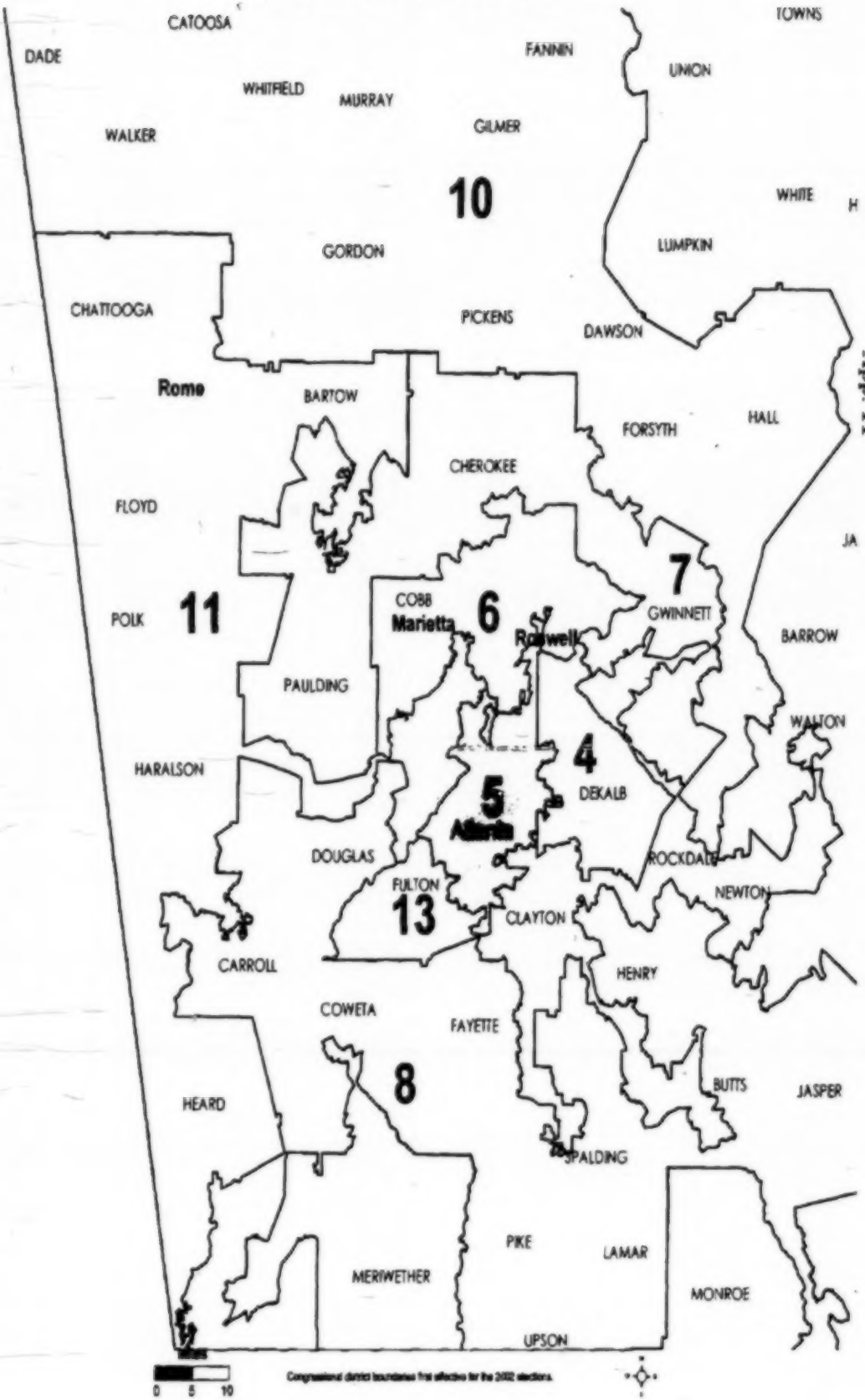

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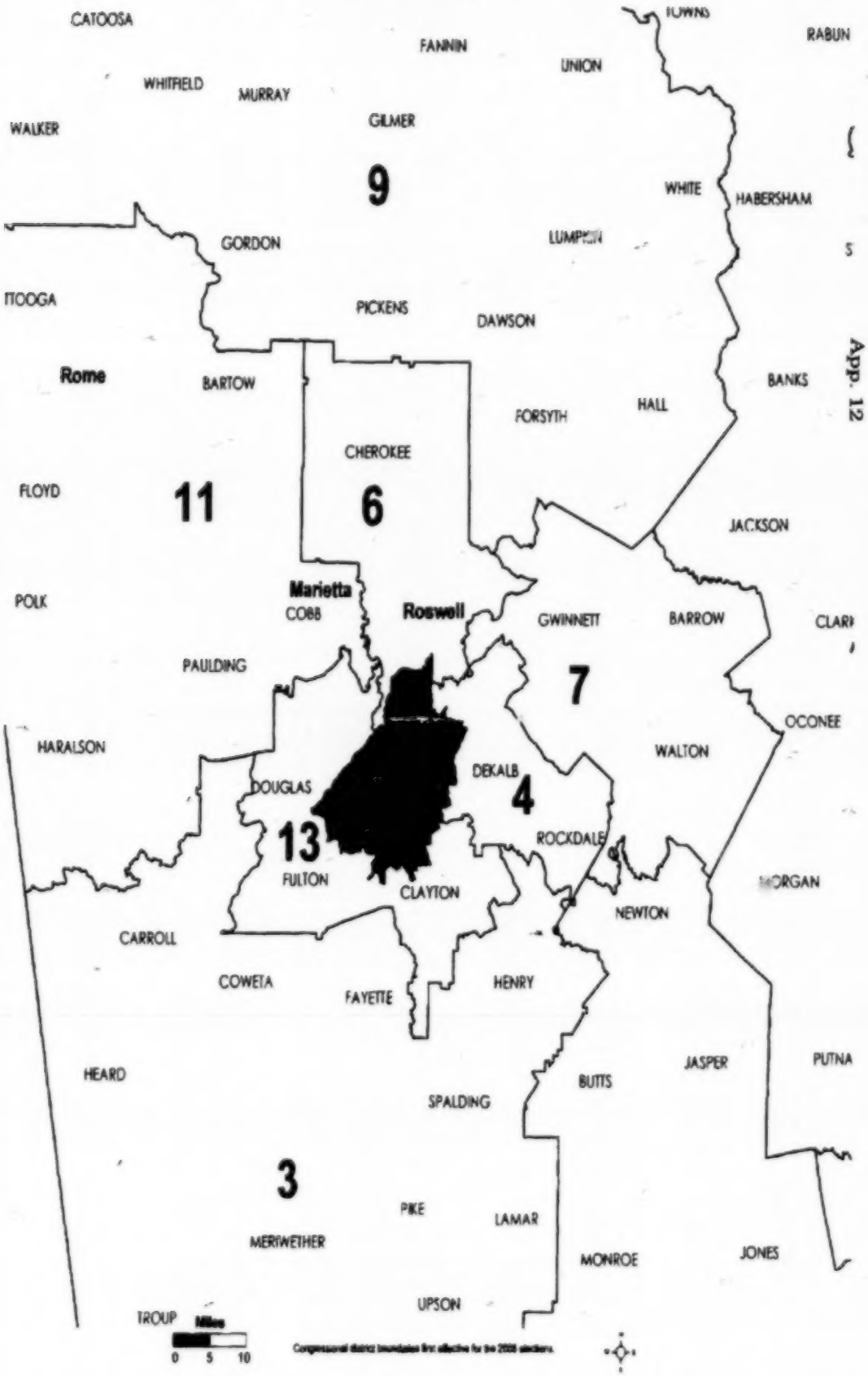

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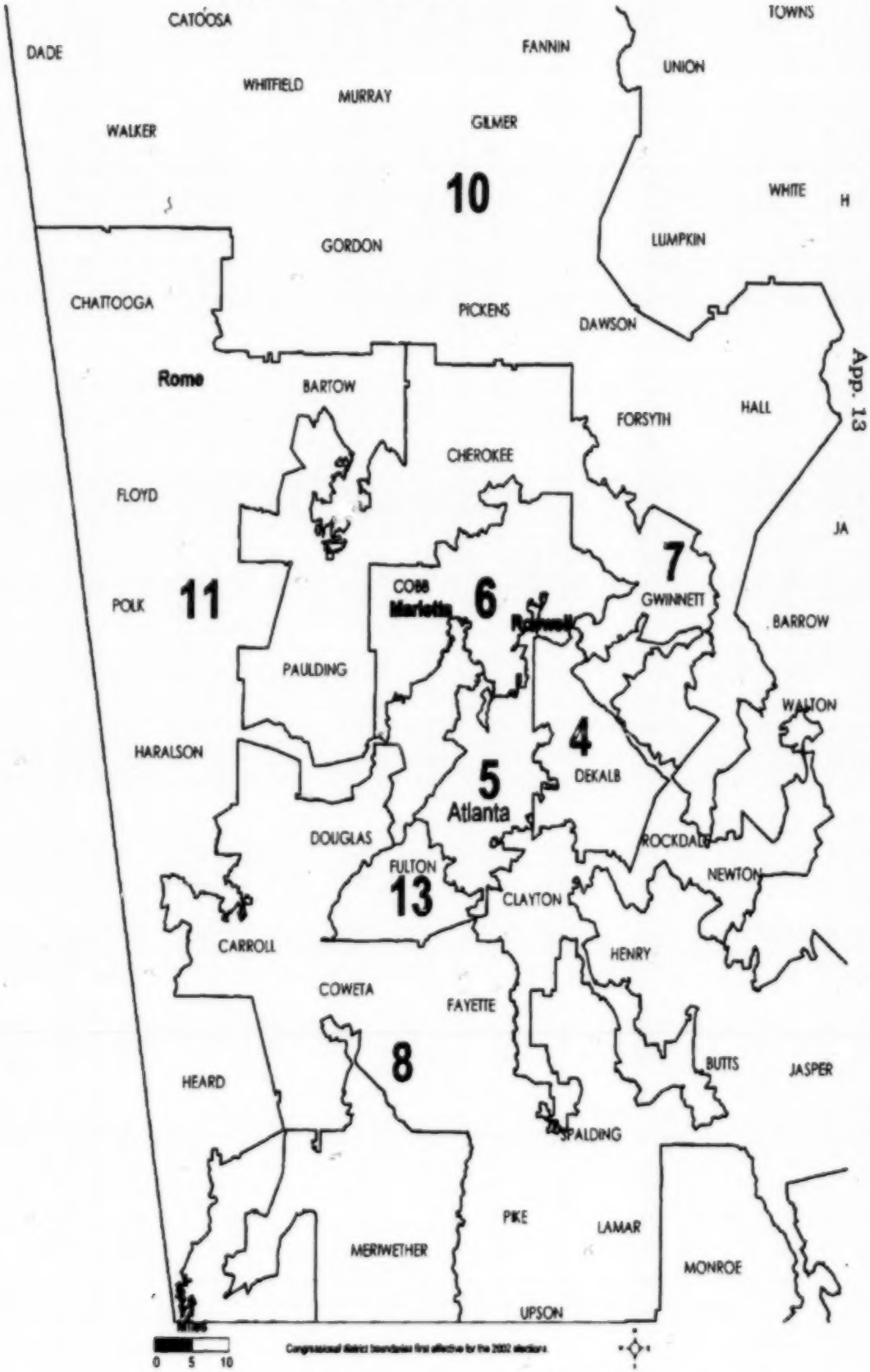

App. 13

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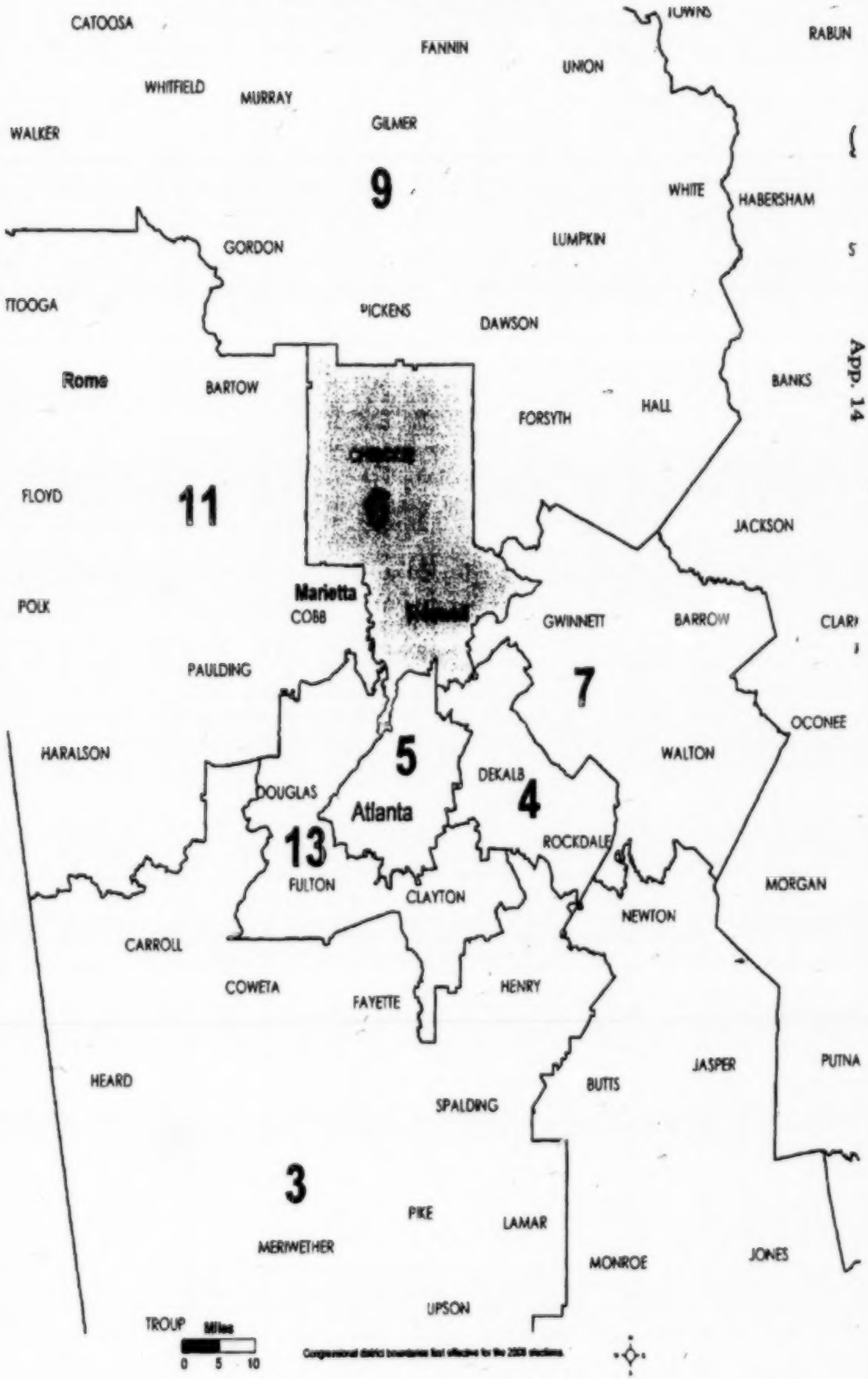
Congressional Districts for 2006-2010 elections.



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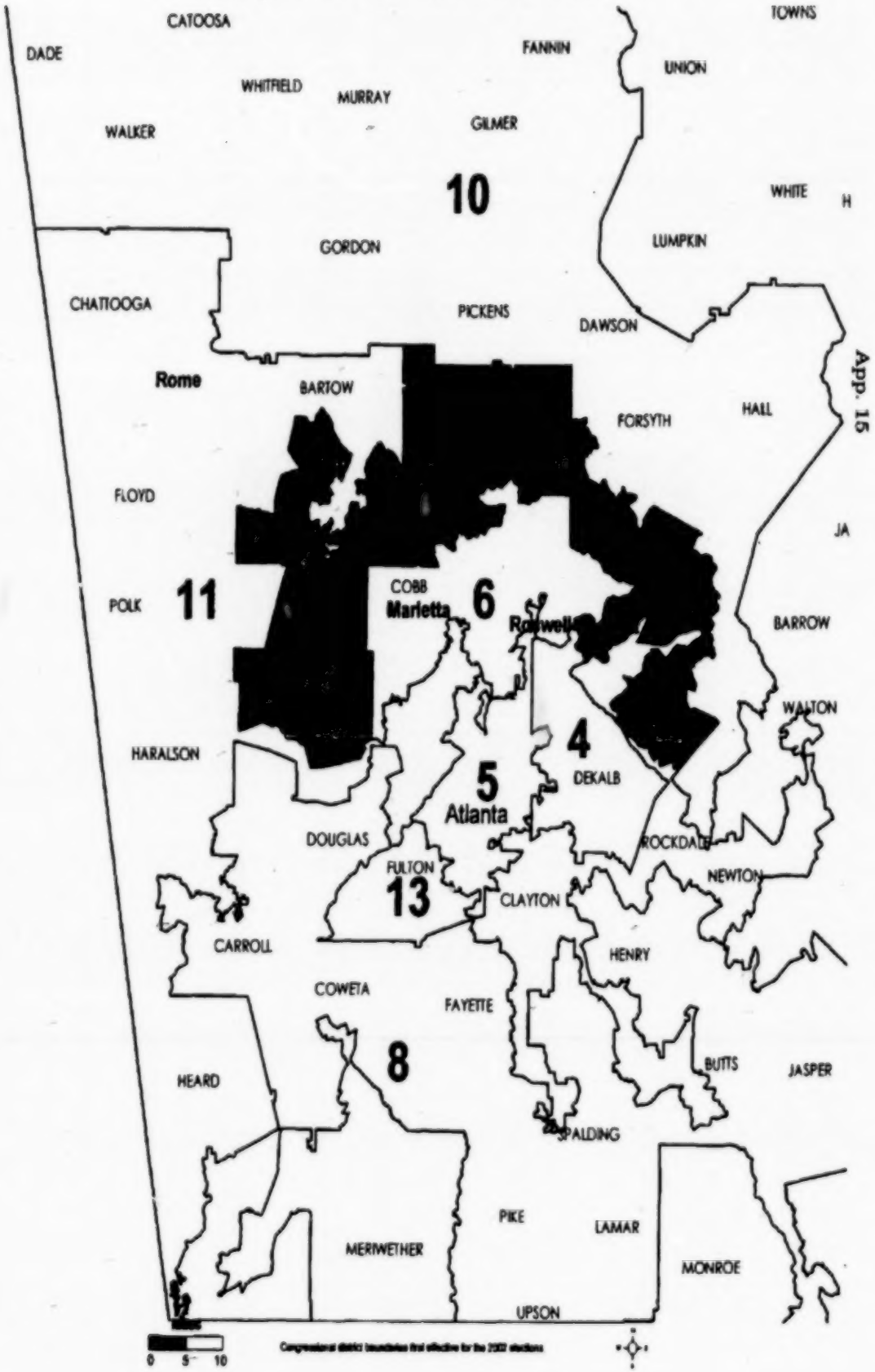

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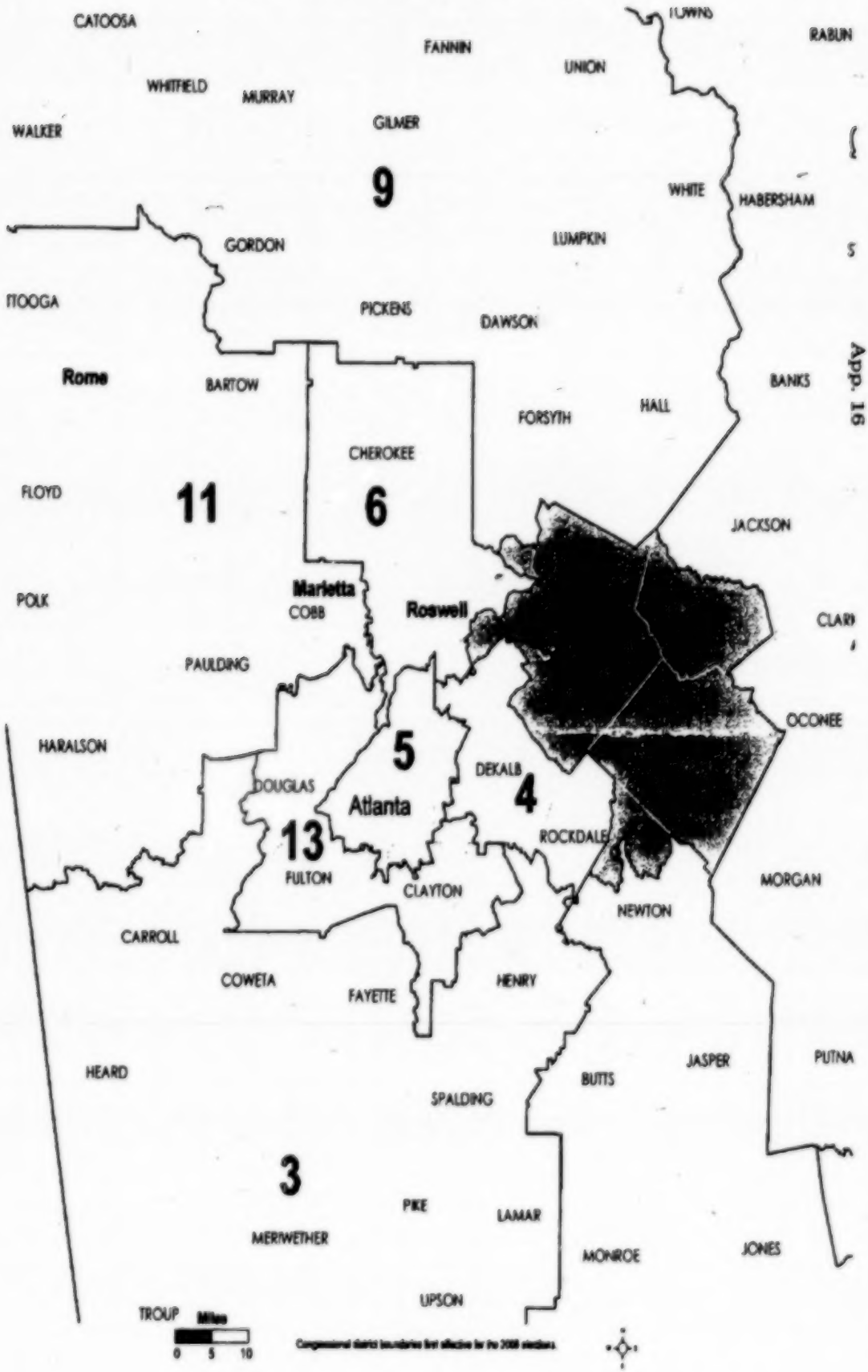


App. 16

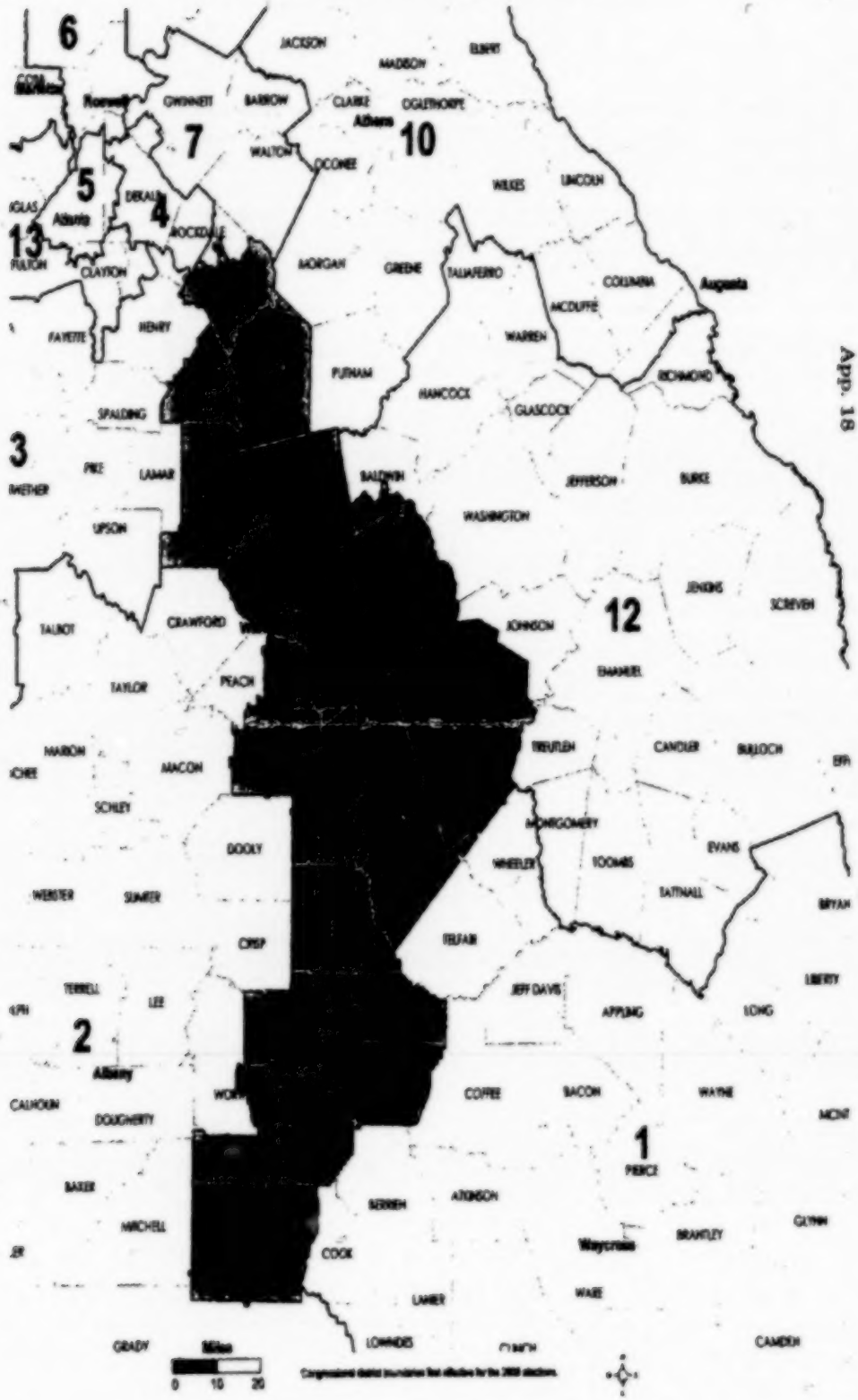
Georgia

Congressional Districts for 2002-2004 elections.

App. 17

Georgia

Congressional Districts for 2006-2010 elections.



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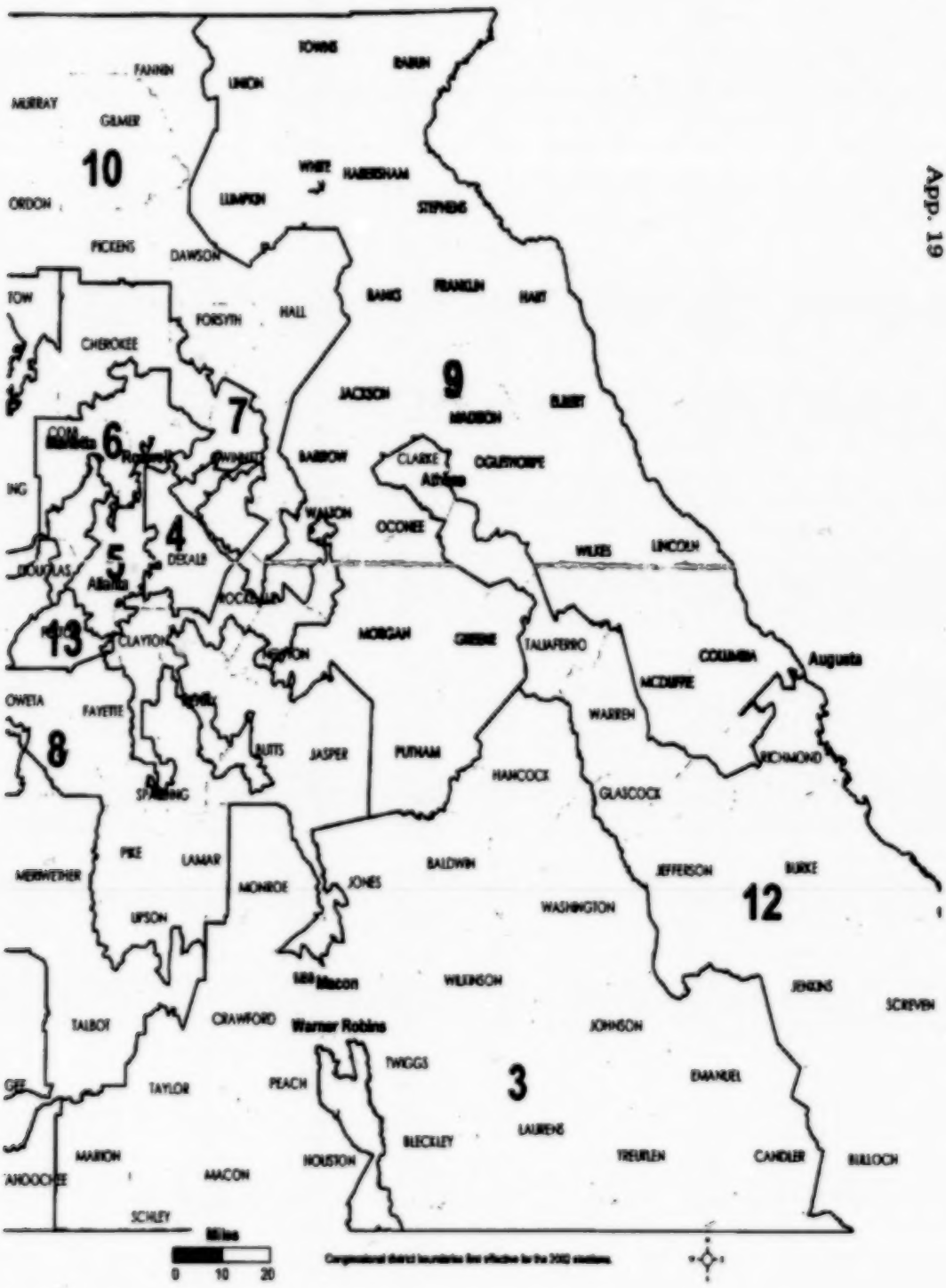
Congressional Districts for 2002-2004 elections.



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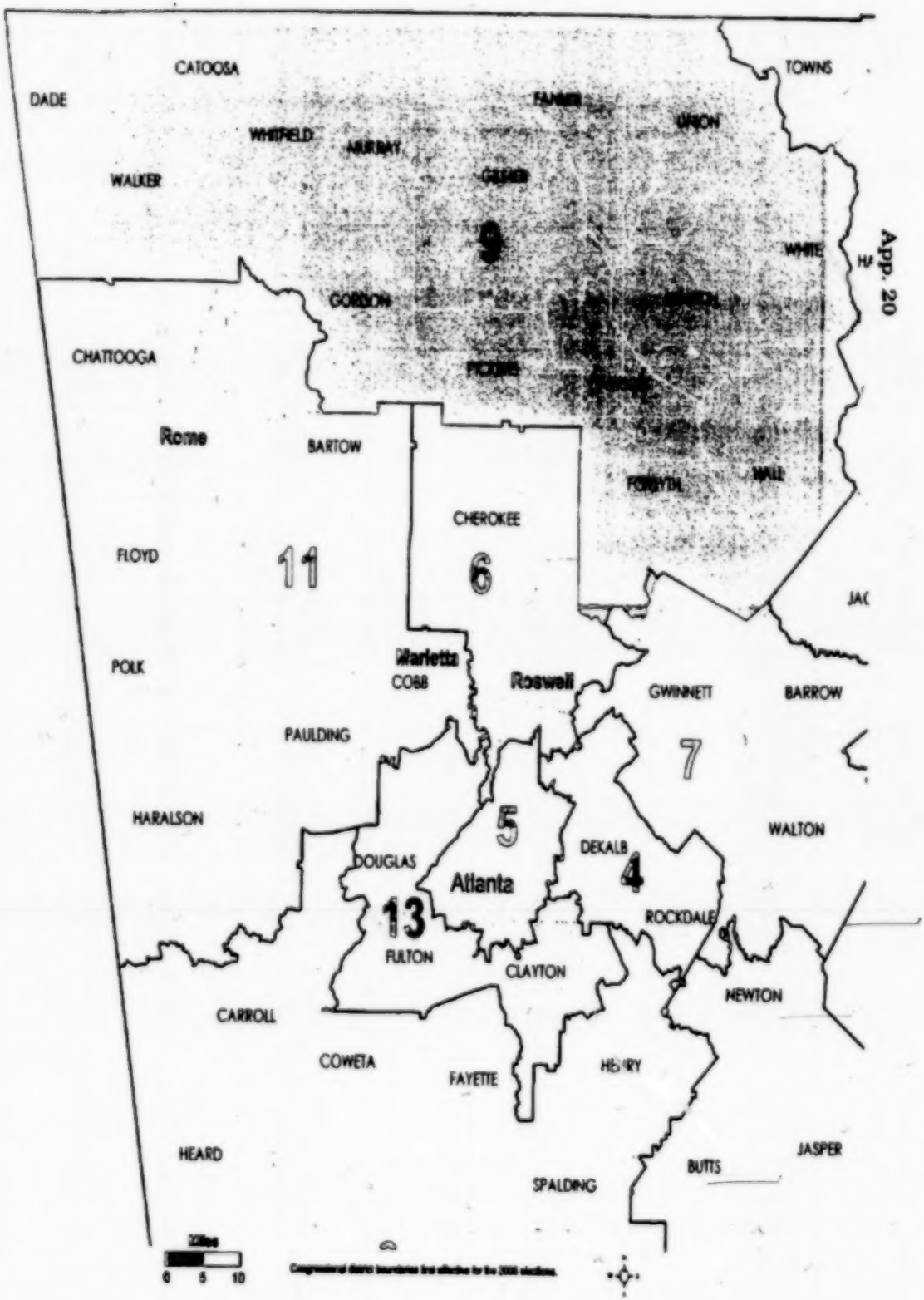

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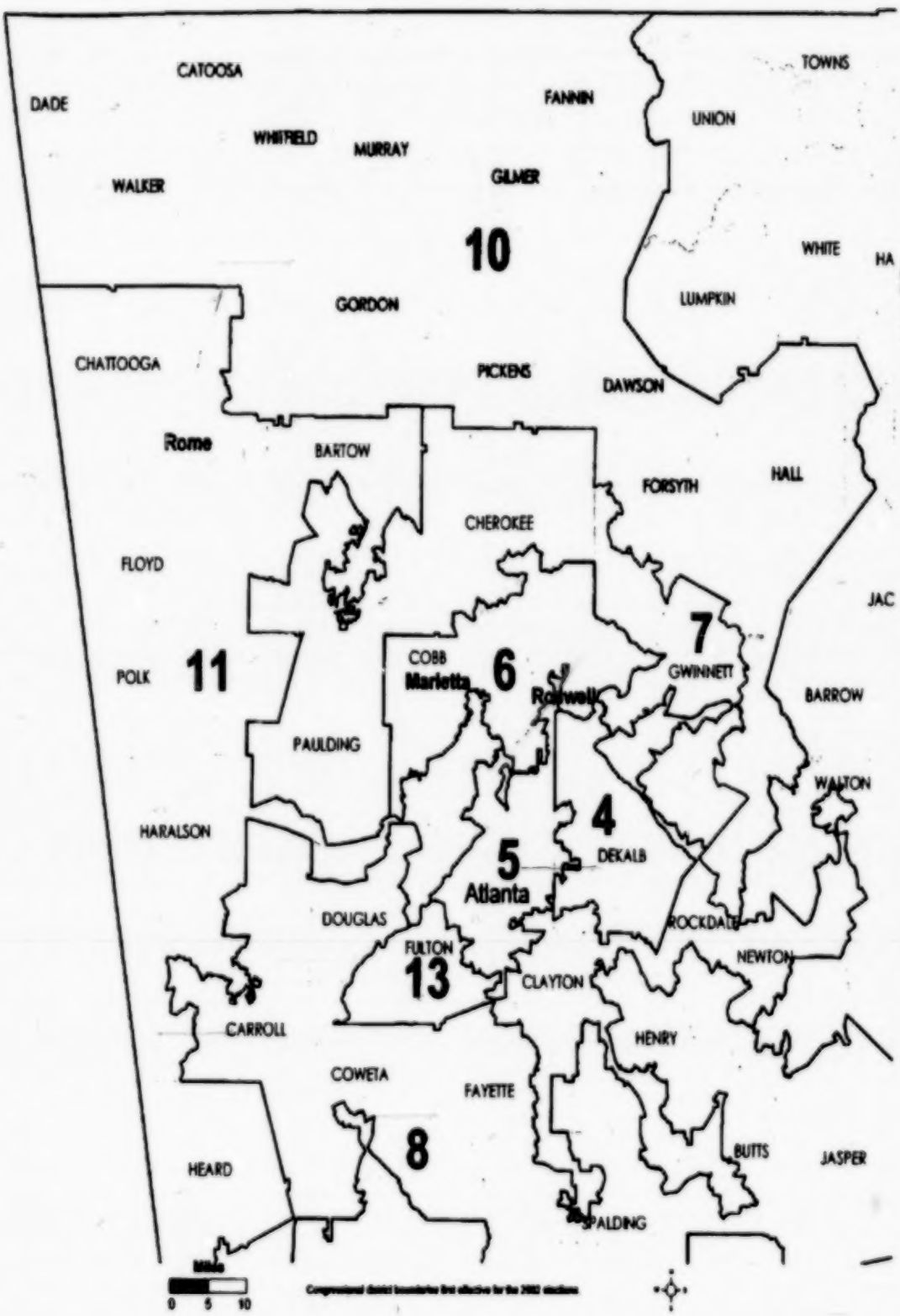

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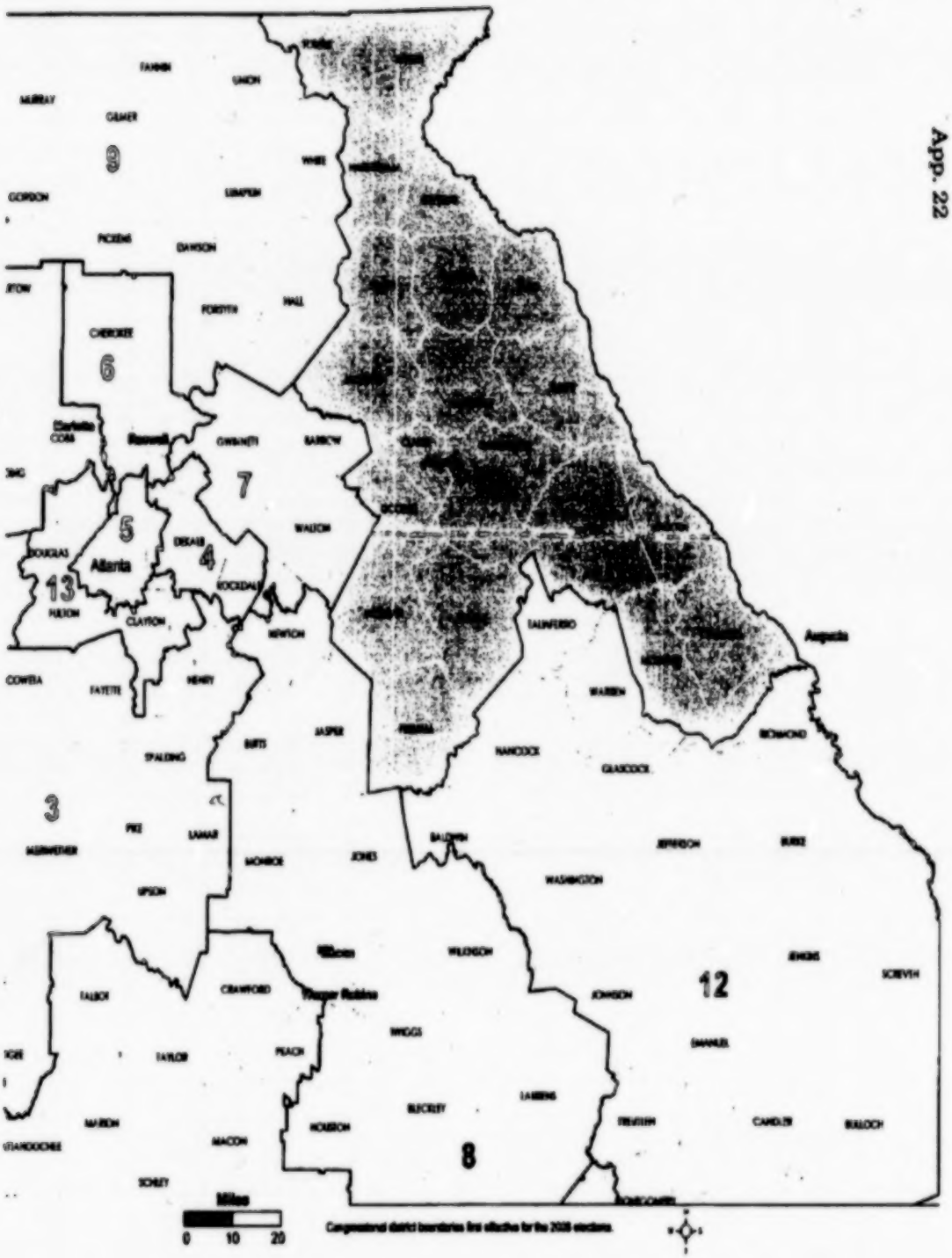
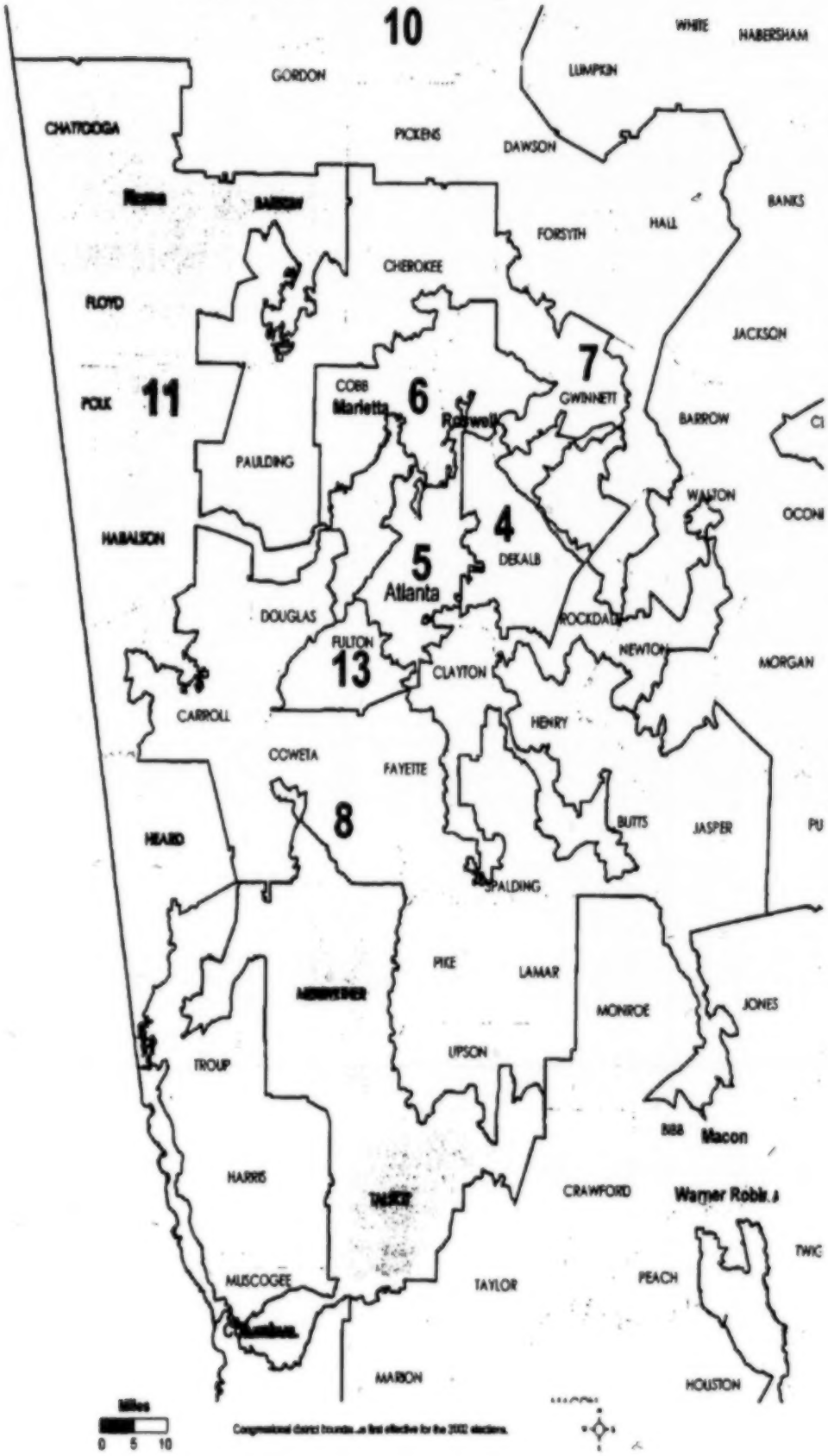


Georgia

Congressional Districts for 2002-2004 elections.



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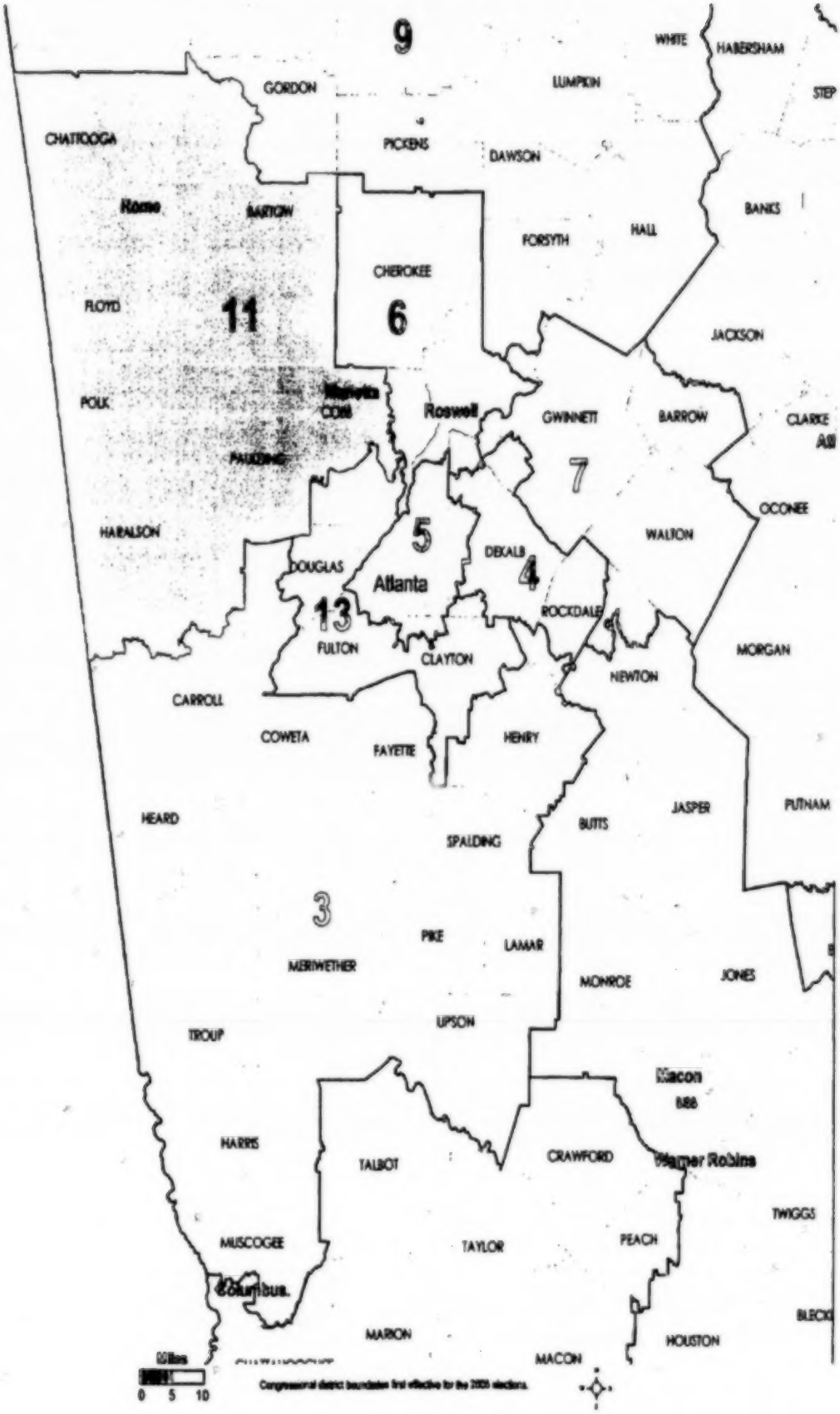

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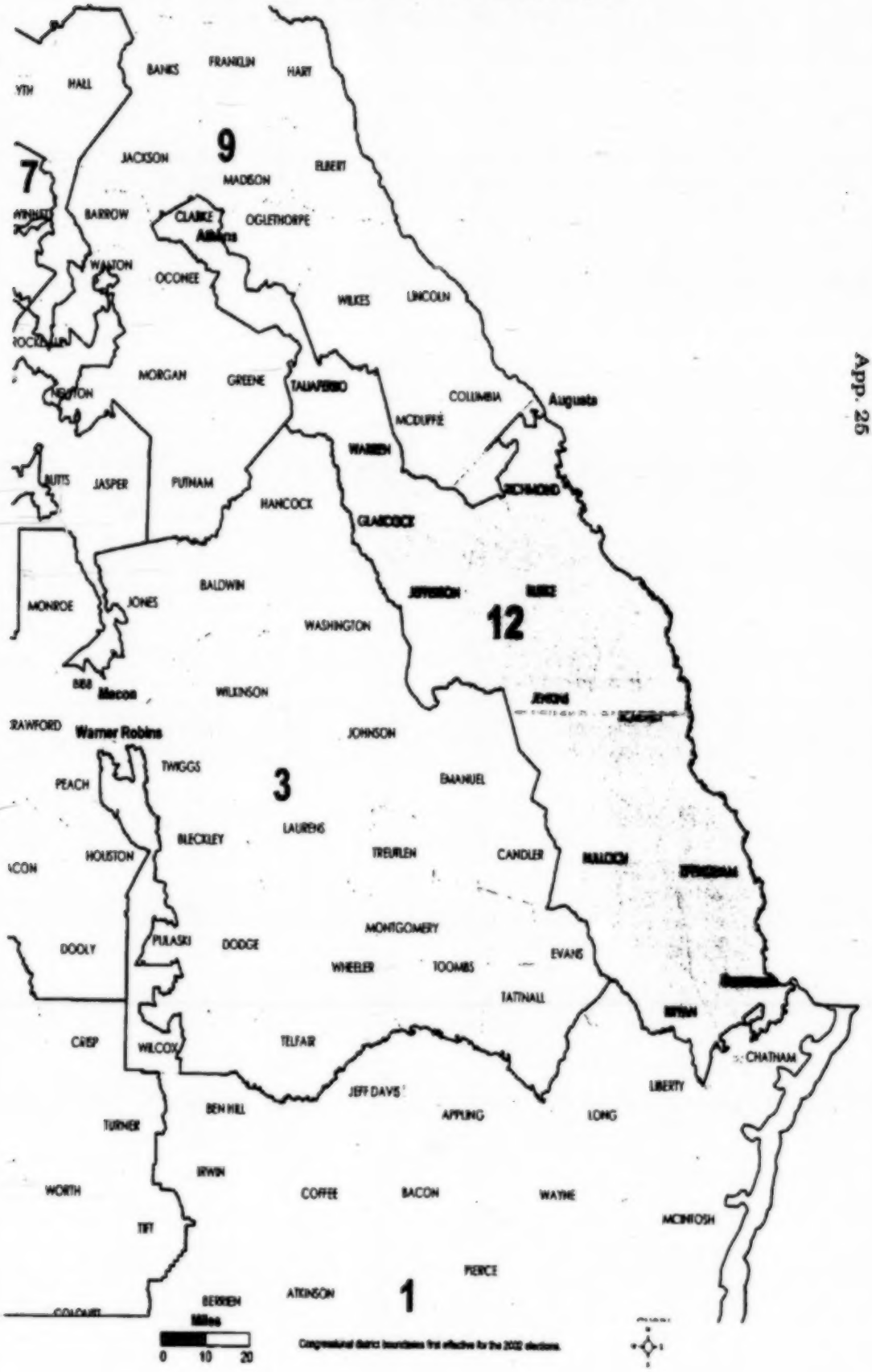
Georgia

Congressional Districts for 2002-2004 elections.



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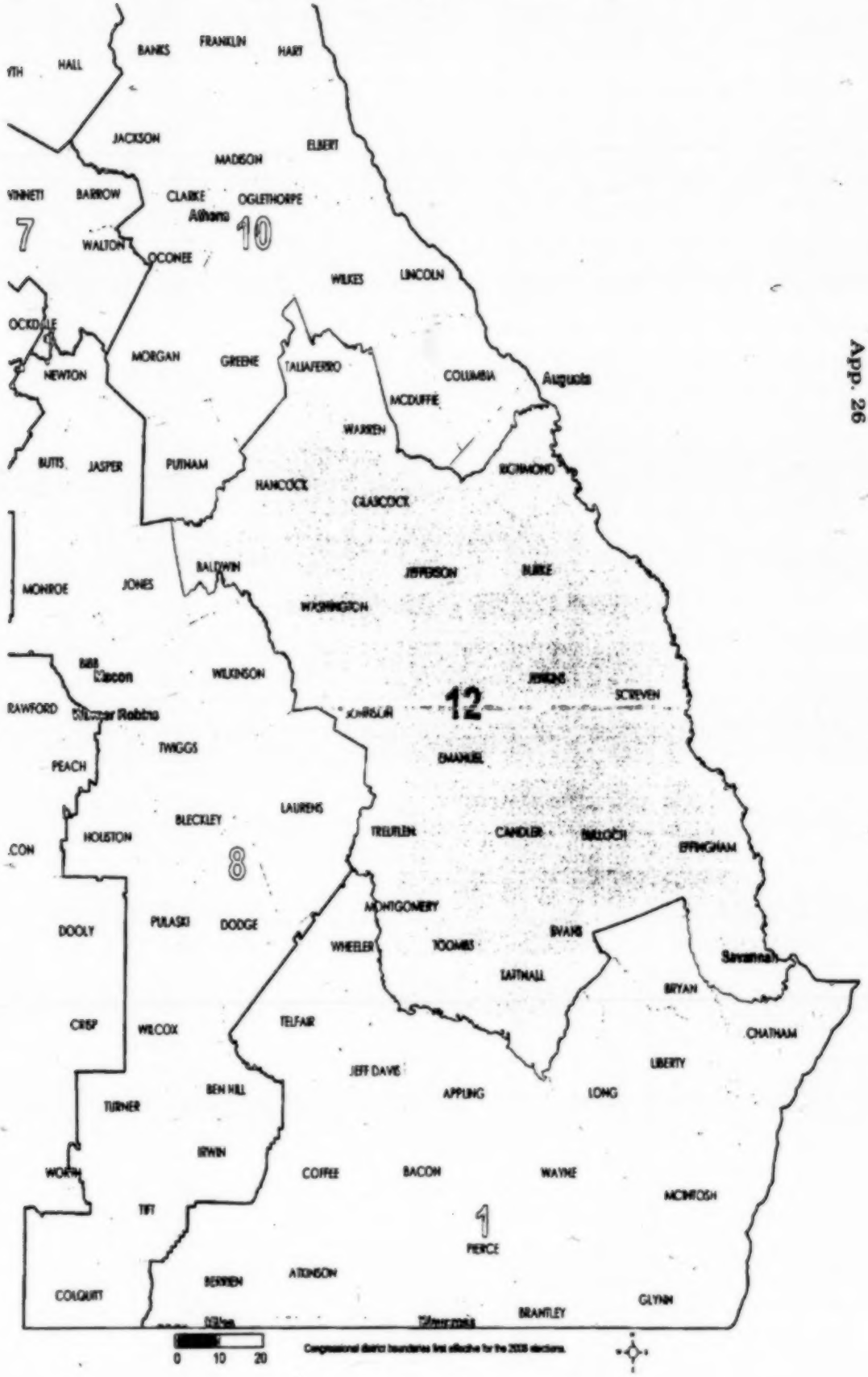
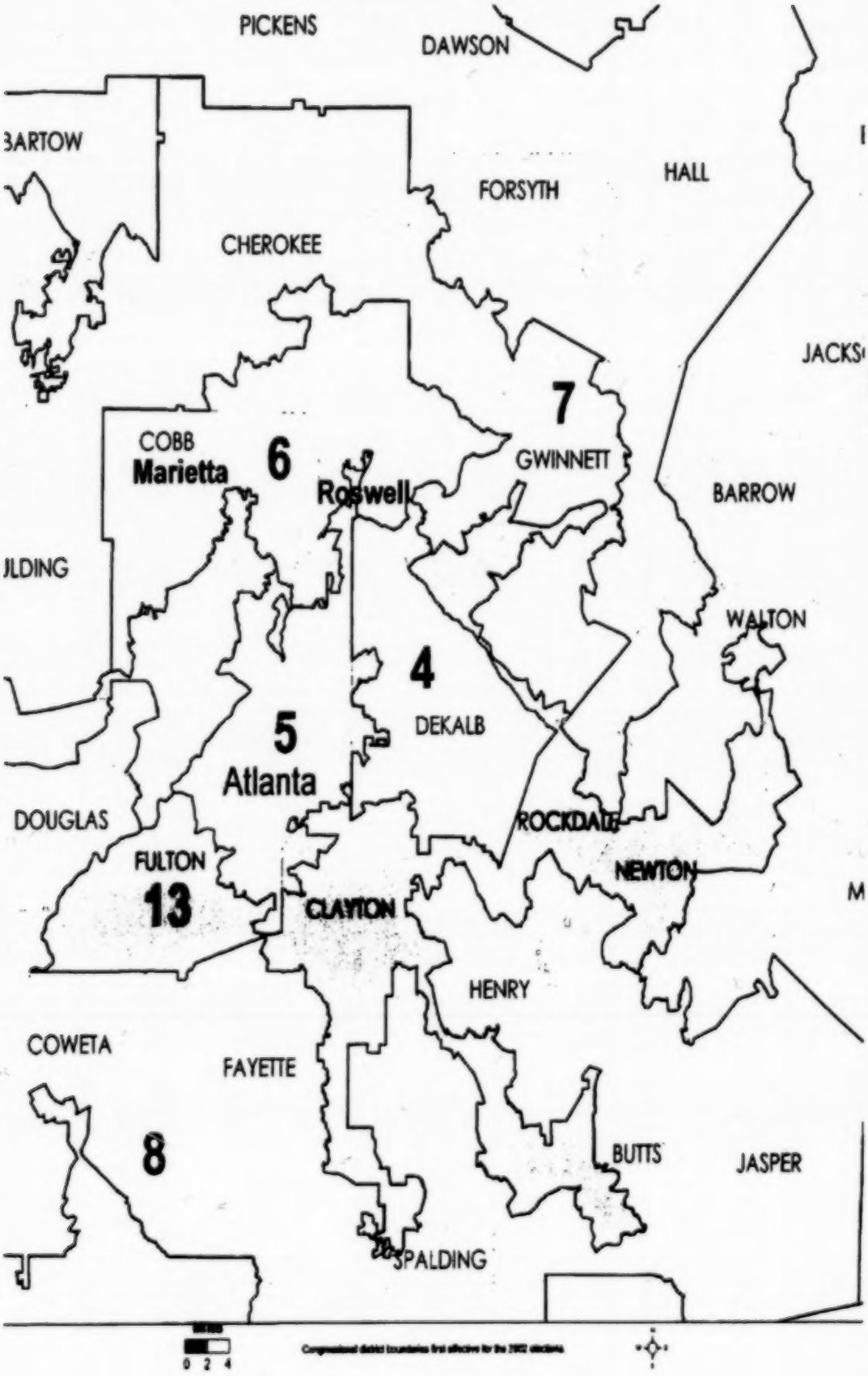


Congressional district boundaries first effective for the 2003 elections.

Georgia

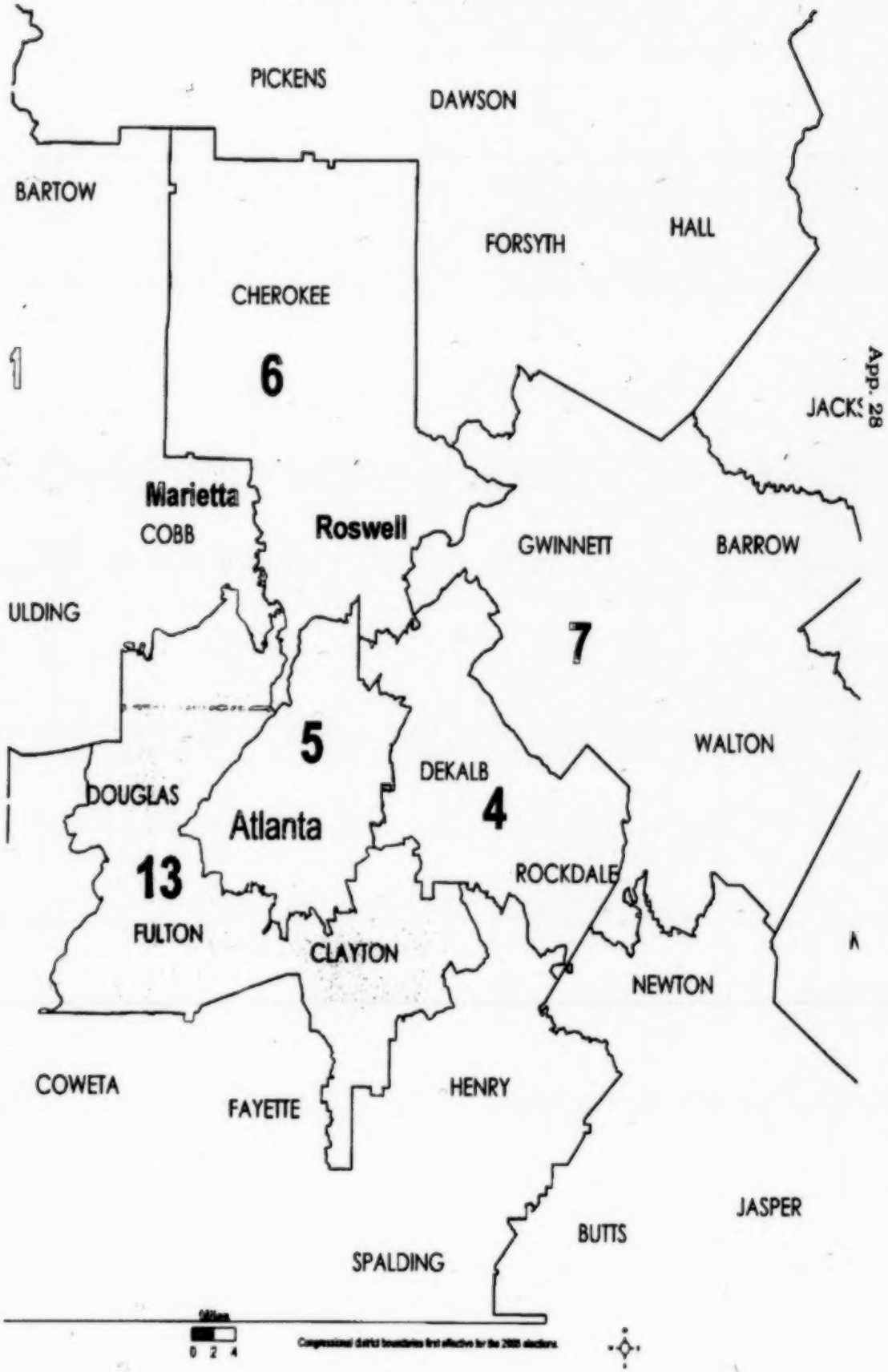
Congressional Districts for 2002-2004 elections.



App. 27

Georgia

Congressional Districts for 2006-2010 elections.



App. 28

(5) (6) (8) (6)

Nos. 05-204, 05-254, 05-276 and 05-439

In The
Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

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BRIEF OF *AMICUS CURIAE* UNIVERSITY PROFESSORS CONCERNED ABOUT EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE IN SUPPORT OF APPELLANTS

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EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

GI FORUM, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

QUESTION PRESENTED

May a legislative body, in mid-decade, voluntarily and without a compelling reason replace a valid districting plan with a new one relying on the population data from the last census?

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INTEREST OF *AMICUS CURIAE*

This *Amicus Curiae* brief is submitted on behalf of the University Professors Concerned About Equal Representation For Equal Numbers of People. The individual *Amici* are Professors David A. Anderson (University of Texas), Julius P. Getman (University of Texas), Teresa R. LeClercq (University of Texas), Sanford V. Levinson (University of Texas), Lucas A. Powe, Jr. (University of Texas), Jordan Steiker (University of Texas), Jay L. Westbrook (University of Texas), and John Aldrich (Duke University).[1] This *Amicus* organization is submitting this brief because of concern over the impact of this case on the fundamental principle that legislative bodies must make a good faith effort to provide the citizens of a state with election districts as equal in population as practicable. The resolution of this case will be significant to the constitutional jurisprudence of this country.

The "University Professors" participated fully in this case on remand as an *Amicus*. The District Court below *sua sponte* required the State Defendants to respond to the *Amicus* brief and required the Plaintiffs to provide time at the hearing on January 21, 2005 for an oral presentation by Professor Powe on behalf of *Amicus*. Much of the lower court's written opinion deals with the written and oral arguments presented by *Amicus*. The equal representation for equal numbers of persons issue addressed by *Amicus*

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amicus* states that none of the parties authored this brief in whole or in part and no one other than the *Amici* or counsel contributed money or services to the preparation and submission of this brief.

below and in this brief is essentially raised by two of the Appellants[2] in this consolidated case. The *Amici* believe that the information provided in this brief will assist this Court in resolving the difficult questions posed in this case.

SUMMARY OF ARGUMENT

The congressional redistricting plan passed by the Texas legislature in 2003 was drawn voluntarily and for partisan reasons. It replaced a lawful existing plan. These facts distinguish this case from the many other redistricting cases decided by this Court in the past forty years. The new plan utilized population data that were outdated and inaccurate. This Court has never directly considered whether a partisan use of the electoral process under such circumstances is constitutional.

Appellees claimed in the court below that any legislatively enacted redistricting plan complies with the constitutional requirement for equal population among election districts so long as it contains districts that are equal in population based on the enumeration from the last federal decennial census. *Amicus* urges that the constitutional mandate requires that a legislature cannot voluntarily redistrict using population data that is known to be outdated and inaccurate unless a compelling state reason exists for the redistricting and the use of the data. Otherwise such

[2] The Travis County Appellants and the League of Latin American Citizens Appellants have raised similar "one person, one vote" or "equal population" challenges to the 2003 Texas redistricting. This *Amicus Curiae Brief* is submitted in support of these Appellants, but is not submitted in opposition to the position of any Appellant.

redistricting, to further the partisan designs of a temporary legislative majority, is a breach of a legislature's fundamental duty to make a good faith effort to provide its citizens with election districts as equal in population as practicable.

Appellees' legal position is a threat to representative government in this country. This brief discusses several of the dangers inherent in Appellees' position. One threat, however, stands out as a result of oral argument in the court below. In response to a question from that court, Appellees' counsel correctly acknowledged that, if the Appellees' legal position is correct, a state legislative body can voluntarily redraw state legislative districts at the end of a decade (e.g., 2009) using data from the prior federal decennial census. Such a possibility means that a temporary political majority in a highly charged partisan environment can voluntarily redraw state legislative districts immediately prior to elections at the end of a decade (e.g., 2010) notwithstanding population shifts in the state over the decade. Through this maneuver, a temporary partisan or interest majority can redistrict to preserve or enhance its political advantages and thereby unfairly control the redrawing of state and congressional districts after the new census.

Many other state and local government officials have already publicly expressed an interest in the possibility of following the Texas example and redrawing existing election districts during this decade to benefit one partisan or special interest over another. Others will surely do so if this Court upholds the Texas congressional redistricting plan. Such a prospect of a "rolling redistricting" on the basis of old, inaccurate population data is anathema to the constitutional principle of one person, one vote and a

threat to representative government. It would constitute further unfortunate confirmation of representatives picking their voters rather than vice versa.

Adoption by this Court of the position urged by *Amicus* in this brief can end this threat through the common sense, easily administered application of existing constitutional principles.

ARGUMENT

I. Voluntary Redistricting Using Inaccurate Population Data is a Threat to Fundamental Constitutional Rights and Representative Government.

Few, if any, officials have suggested that voluntary redistricting mid-decade is a good policy. Virtually any redistricting is likely to be divisive, distracting, confusing to voters, and costly of legislative time and energy. As shown by the extraordinary events in Texas in 2003, a voluntary mid-decade redistricting undertaken to maintain or enhance a temporary majority's political strength is likely to be even more disruptive. Voluntary redistricting mid-decade by a state or local legislative body using inaccurate population data is a way of thwarting political changes that would normally accompany population changes and shifting voter preferences. As Justice Breyer recognized in his dissent in *Vieth v. Jubelirer*,[3] a political party might redistrict periodically during a decade to

[3] 541 U.S. 267 (2004).

preserve its political advantages notwithstanding population shifts in the state. A temporary majority in a state legislative body may redistrict state legislative districts at the end of a decade to permit itself to maintain or enhance its dominance for the critical time of redistricting after the new census. The court below asked Appellees' counsel whether Appellees' legal position in this case would permit such a redistricting for partisan advantage at the end of a decade, and Appellees' counsel correctly answered that it would.[4]

The 2003 redistricting in Texas is a perfect example of how Justice Breyer's concerns were fulfilled. The final redistricting plan passed in Texas was unlike either of the plans passed earlier in the legislative session by the Texas Senate or the Texas House. The conference committee that was charged with resolving differences between the two plans never met. Instead, the final plan was accomplished literally behind closed doors by a handful of like-minded partisan activists using computers to manipulate data from a variety of political data bases designed to predict how each election precinct statewide would perform in future congressional elections. Plans were endlessly tweaked on computer monitors to achieve the best possible partisan result. All of this secret activity occurred under scrutiny and pressure from external partisan interests. The 2003 memoranda[5] from Mr. Jim Ellis to Congressman Tom DeLay provide a valuable insight into what was actually happening throughout 2003 and at this final stage. In his memorandum of October 5, 2003, Ellis notes

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[4] Transcript at 138-139 (January 21, 2005).

[5] Jackson Pls. Exhibit No. 136.

that he and Congressman DeLay had already achieved the goals of "helping Bonilla (District 23) and eliminating the Frost district (District 24)" through changes achieved at the conference committee. However, Ellis urged that further "major adjustments must be made to ensure that the map reflects the priorities of the congressional delegation and not the legislature." Ellis lamented that the map under consideration at the time was still flawed with "largely insignificant state legislative agendas." Ellis concluded his October 5th memorandum to DeLay with the insistence that "[w]e need our map, which has been researched and vetted for months. The pre-clearance and political risks are the delegation's and we are willing to assume those risks, but only with our map."[6]

Congressman DeLay journeyed again to Austin. For the next few days he met with the state officials. Ellis got his wish. The final redistricting map was unveiled on October 9th, only three days before it was finally passed by an exhausted Texas Legislature. This final plan embodied an extreme partisan aggressiveness. Unlike the maps adopted earlier by the Texas House and Texas Senate, this final plan bolstered Republican Congressman Bonilla's District 23 with Anglo Republican counties, dismantled District 24 (Congressman Frost), and targeted every Anglo Democratic incumbent for defeat by dismantling their existing districts and leaving their residence in a heavily Republican district. The plan was a partisan masterpiece that not only resulted in the immediate (2004) gain by Republicans of six seats in Congress from Texas,[7] but will

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[6] Id.

[7] The plan resulted in a loss of six Democratic seats in Congress. Four Democratic incumbents were defeated for reelection in the 2004

(Continued on following page)

control the outcome in Texas congressional elections for the foreseeable future notwithstanding expected population shifts that otherwise should favor Democrats.

Voluntary redistricting may use unreliable federal decennial census data to disguise redistricting plans drawn to unfairly discriminate in a real sense against certain categories of voters. By using more current political and demographic data, such as voting trends (in voter registration, voter turnout, and partisan tendency), to determine district boundaries, a temporary legislative majority may pack opposing voters in as few districts as possible or counter an anticipated future growth in opposing voters in an election district by removing the voters from the endangered district. This discrimination may be disguised by the use of old, currently inaccurate census data to justify the new district configurations.

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general election (Congressmen Max Sandlin, Nick Lampson, Martin Frost and Charles Stenholm). One Democratic congressman (Jim Turner) declined to seek reelection in his redrawn district that contained only 4% of the residents of his previous district. One Democratic congressman (Ralph Hall) switched parties after the redistricting and won reelection in 2004 in his redrawn district as a Republican. Democratic Congressman Chris Bell was drawn out of his district and placed in a heavily Republican district. He sought reelection in a nearby congressional district, but lost in the Democratic Primary to African-American candidate Al Green. Only three of the ten Anglo Democratic incumbents won reelection as Democrats in 2004. Two of these won reelection only by running in nearby districts that are overwhelmingly Hispanic. The overall result of the redistricting was the defeat, retirement or switch of seven of the ten targeted Anglo incumbent congressmen, the gain by Republicans of six seats in Congress, and the marginalization of the Democratic Party in Texas by the packing of Democratic voters into ten districts, each with a minority population (according to the 2000 census) of over 70%. Only one Democrat, Congressman Chet Edwards, won election in a district with less than a 71% minority population.

The Texas redistricting offers several examples of this discrimination. As shown by the Ellis memos to Congressman DeLay, there was a concern among members of the Republican congressional delegation that Republican Congressman Bonilla could be beaten by a Democratic Hispanic because of the increase of Hispanic population and registration in the congressional district. The solution was to redraw District 23 to replace approximately 90,000 (according to the 2000 census) mostly Hispanic residents in Webb County with an equivalent number of Anglos (overwhelmingly Republican) from counties in central Texas. In reality, of course, this use of inaccurate census data disguised the truth about what was happening. In the 1990s, the number of Hispanics in Texas grew by 2,329,761 persons. The Hispanic rate of growth was 53.68% compared to a growth rate for Anglos of only 7.61%.[8] Texas

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[8] The population figures in this paragraph are from the federal census and may be found in the record of this case in the reports of the Texas State Data Center contained generally in LULAC Exhibits 1-4 on remand. LULAC Exhibit 4 on remand is entitled "Population Change in Texas: Implications for Human and Socioeconomic Resources in the 21st Century." The pages of the exhibit are not numbered, but the data regarding changes in Texas by race and ethnicity can be found in the chart on the 24th page of the exhibit, entitled "Numerical Change in Population by Race/Ethnicity in Texas for 1980/1990 and 1990/2000" and the chart on the 25th page entitled "Percent Change in Population by Race/Ethnicity for 1980/1990 and 1990/2000 in Texas." Estimated changes in population between 2000-2003 are shown in the charts on the 5th page of the exhibit ("Total Population and Components of Population Change in Texas, 2000-2003"), the 7th page of the exhibit ("Ten Fastest Growing States in Numerical Terms in the United States, 2000-2003") and the 9th page ("Ten Fastest Growing States in Percentage Terms in the United States, 2000-2003"). The effect of population shifts among counties in Texas between 2000 and 2003 is shown on the 14th page of the exhibit ("Population Changes in Texas Counties, 2000-2003"). The reports also are available on the web site of the Texas State Data Center www.txdc.edu.

Republican officials, lawmakers and congressmen were aware of this growth when they voluntarily redistricted in 2003. They also knew that this explosive rate of growth in Hispanic residents was continuing (even perhaps accelerating) after 2000. According to official estimates from the federal census and the Texas Data Center, Webb County, with a population that is 90% Hispanic, was one of the state's fastest growing counties between 2000-2003. Detaching half of Webb County from District 23 and replacing it with an equivalent number (according to the 2000 census) of largely Anglo residents from slower-growing counties to the north to protect an endangered Republican incumbent was knowing ethnic and political discrimination disguised by the use of outdated, inaccurate 2000 census data.

At the trial below, Professor Richard Murray of the University of Houston testified that areas added by the redistricting plan to District 29 in Harris County that were shown as predominately black according to the 2000 census were actually increasingly Anglo by 2003. On the other hand, in Dallas County, the final redistricting plan packed the county's minority population into District 18. The minority population of the district was increased to an excessively high 76.1% (according to 2000 census data) by the addition of minority persons taken from the dismantled District 24. However, the 2000 numbers tell only half of the story. In reality, the percentage of minority persons in District 18 is almost certainly higher than 76.1% given the explosive growth of Hispanics in Dallas and Tarrant Counties between 2000-2003. By spreading both African-American and Hispanics among other safely Republican districts in Dallas and surrounding counties, the final

redistricting plan destroyed the possibility that the continuing explosive growth of Hispanic residents in District 24 over the remainder of this decade might make the district an Hispanic opportunity district.

A sometimes unseen threat of voluntary redistricting is its use to discriminate intra-party. In general elections most rural Texans vote heavily Republican in statewide races. However, many of these rural voters sometimes support Democratic candidates in local races or even vote in the Democratic primary. After all, it was these rural voters that had reelected many of the Democratic congressional incumbents in 2002 even while overwhelmingly supporting all of the Republican statewide candidates. The final redistricting plan dilutes the effect of these rural moderate Republican or independent voters by slicing up the state's rural areas (especially in East Texas) and stretching the redrawn districts to include the activist Republican strongholds in the suburbs around the major cities. The redrawn districts[9] permit the staunchly Republican voters in the suburbs to control the Republican primary to the detriment of the more moderate and independent rural voters and thereby to also control the outcome in the general election when a majority of these rural voters again vote for the Republican nominee. Former state senator and acting lieutenant governor (Republican) Bill Ratliff testified at trial that the final redistricting plan discriminated against voters in these rural areas.

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[9] *See* specifically Districts 2, 4, 5, 6, and 8.

The potential adverse impact of voluntary mid-decade redistricting is not limited to the redistricting of congressional districts, or even to the redrawing of state legislative districts. Every city, county, school district or other local government that elects its governing body from election districts would similarly be able to voluntarily redistrict mid-decade to maintain or enhance the political power of a political party or interest group. At the local level, the temporary majority may represent some interest group other than a partisan party. Yet, the threat to representative government is the same. For example, given the intensity of the recent controversy over teaching intelligent design in public schools, it is not difficult to imagine a temporary majority on this issue on a school board taking a lesson from the Republican majority in Texas and deciding to voluntarily redistrict in an effort to keep its majority on the governing board.

In sum, voluntary mid-decade redistricting using sophisticated political data bases along with old, inaccurate census data permits a temporary majority to engineer a redistricting plan that will maximize the group's voting strength for the foreseeable future to the detriment of representative government. The final Texas congressional redistricting plan is an excellent example. According to the federal bureau of census and the state data center, by 2004 Anglos were a minority of the state's population. Moreover, these sources predict that the percentage of Anglos in Texas will continue to decline. Some Texas State Data Center projections show that the percentage of Anglos in the state population may drop to 45.6% by 2010.[10] However, the 2003

[10] LULAC Exhibit 4 on remand in the chart entitled "Population in Texas by Race/Ethnicity in 2000 and Projections of the Population in

(Continued on following page)

redistricting plan is carefully designed to allow a subset of the Anglo demographic group (i.e., activists in the Republican Party) to control the outcome in at least 21 of the state's 32 congressional districts[11] for this decade and possibly the foreseeable future notwithstanding this explosive growth of the state's Hispanic residents.

If the legislative body does not make a good faith effort to provide election districts that afford equal representation to equal numbers of people, it will deliberately reduce the voting power of many of its citizens. Such a reduction is an affront to and is inconsistent with the basic concept of democratic voting. Partisan or interest group game playing by a legislature should not be allowed to threaten the fundamental rights of citizens or representative government.

Texas by Race/Ethnicity from 2010 to 2040." The chart is on the 35th page of the exhibit and shows projections based on different assumptions. The calculation in the text is the projection based on an assumption that migration continues at a rate equivalent to the estimated rate for 2000-2002 and appears in the chart on the 37th page ("Percent of Population in Texas by Race/Ethnicity in 2000 and Projections of the Percent of the Population in Texas by Race/Ethnicity from 2010 to 2040").

[11] The ratio is more likely to be 22-10. One Anglo Democratic incumbent, Chet Edwards, won reelection in 2004 in a district (District 17) that voted overwhelmingly Republican in other races. The district is not likely to continue to elect a Democrat especially once Edwards leaves office.

II. The Constitution of the United States Prohibits Redistricting With Inaccurate Population Data to Replace a Lawful Existing Districting Plan Except in Furtherance of a Compelling State Interest and as Narrowly Tailored to Meet That Interest.

The Constitution of the United States, through Article I, Section 2 and the Fourteenth Amendment, requires that a state or local legislative body "make a good faith effort" to draw all election districts "as nearly equal in population as is practicable."[12] In *Westberry v. Sanders*,[13] this Court explained that Article I, Section 2 of the United States Constitution requires "equal representation for equal numbers of people [as] the fundamental goal for the House of Representatives" because this establishes a "high standard of justice and common sense."[14]

Article I, Section 2 governs congressional districts and "permits only the limited population variances that are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."[15] "[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how

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[12] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *Karcher v. Daggett*, 462 U.S. 725, 730 (1982).

[13] 376 U.S. 1 (1964).

[14] Id. at 18.

[15] *Karcher*, 462 U.S. at 730, quoting from *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

small."[16] Once a constitutional plan is in place it remains valid for the remainder of the decade.

The population enumeration from the recent federal decennial census is used for measuring the equality of existing districts and for designing new election districts. From the moment of the taking of the actual census onward, however, populations throughout state and local jurisdictions are constantly changing, often at different rates, up or down. Ordinarily, any resulting inaccuracy in census data does not affect the constitutional merits of districting plans using such data because: (1) the new districting plan is replacing an existing unconstitutional districting scheme that cannot be used for future elections and (2) most districting plans are enacted within the narrow window between when the census data first becomes available (e.g., early 2001) and when the new districts must be in place for the upcoming party primary and general congressional and state legislative elections (e.g., 2002). Census data, even though flawed, are the best and perhaps the only lawful tools in such circumstances for drawing districting plans to replace unlawful districts.[17] After all, there is effectively no alternative. The data from the last census comprise the most comprehensive, precise and objectively attainable enumeration data available.

Mid-decade replacement of a valid existing districting plan with a new plan based on now older and even less reliable census data poses a new problem. As time passes

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[16] *Kirkpatrick*, 394 U.S. at 531.

[17] *See Karcher*, 462 U.S. at 736 ("[T]he census data provides the only reliable – albeit less than perfect – indication of the districts' 'real' relative population levels.").

after a census is taken, the census enumeration provides an increasingly unreliable means for determining the relative equality of districts (especially in a fast-growing state like Texas). Although impossible to specifically quantify, this increasing inaccuracy and unreliability in population data is evident to members of state and local legislative bodies, to all participants in any redistricting process, and to state and federal courts. Therefore, a state or local legislative body that redistricts using such data is doing so without a true guide as to the real impact of the enactment on the equality of the district populations. At its most benign, the legislative body is guessing as to whether the new districts will be more or less equal in population than the valid existing districts. It is possible that a new voluntary redistricting plan based on old census data will not result in a districting plan in which the districts are more malapportioned than the existing one. Through some coincidence, the real population deviations among the new districts (drawn using census data that is now older and less reliable than before) could be less than the real population deviations of the existing ones. Conversely, it is also possible that the new plan may be grossly more malapportioned than the existing one. Inaccurate census data provide no reliable answer. It is the legislative body that bears the constitutional responsibility for making a good faith effort to provide election districts of equal population and that has the burden for justifying its voluntary redistricting. Under such circumstances the districts in the new enactment can not be presumed to be the result of a good faith effort to fulfill the fundamental constitutional duty of providing equal representation for equal numbers of people. Implicit in the concept of "good faith" is the use of currently reliable population data.

There are, of course, occasions when a legislative body may find it necessary to adopt a redistricting plan "mid-decade" to replace an existing plan. The critical legal issue, however, is not whether a particular redistricting enactment is considered "mid-decade," but whether the enactment is replacing a valid existing plan. Court decisions following *Reynolds v. Sims* show how it may be necessary to use even out-dated and unreliable census data mid-decade to design a new districting plan to replace an unconstitutional one.[18] If a districting plan has been struck down mid-decade, that required a legislative body or court to redraw the affected districts based on old census data.[19] Replacing an unlawful districting scheme is a compelling state interest. In such circumstances, the mid-decade use by the legislative body or court of old, unreliable census data is a result of necessity, and not, as urged by Appellees, an unrestricted license to use such data to voluntarily redraw lawful districts for any reason whatsoever.

In view of the potential impact of such increased malapportionment on the fundamental rights of a state's citizens, any voluntary redistricting must be subject to strict scrutiny. This strict scrutiny must extend both to the enactment's effect on real population equality and to the legitimacy and importance of the interests offered to justify the changes in district boundaries.

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[18] *See, e.g., Kirkpatrick* (considering a 1967 legislative enactment drawing congressional districts on the basis of 1960 census data to replace an existing unconstitutional districting plan).

[19] *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996) (upholding a finding that certain of Texas's 1991 congressional districts were racial gerrymanders violative of the United States Constitution).

III. The District Court Below Erred by Upholding the 2003 Congressional Redistricting Plan.

While all of the members of the court below acknowledged that mid-decade redistricting is not good policy, they split over whether the argument raised by *Amicus* should be adopted. District Judge Ward indicated that he would adopt the one person, one-vote arguments presented by *Amicus* and Travis County. The other members of the court, Judges Higginbotham and Rosenthal, acknowledged that the *Amicus* argument was a narrower and seemingly more plausible contention than the claims of excessive partisanship, but declined to adopt it. The majority offered six reasons for why it was not persuaded to adopt the argument. None is persuasive.

First, the court (including Judge Ward) concluded that the *Amicus* argument for application of the requirement of equal representation for equal numbers of persons was not within the scope of this Court's remand. Whether correct or not, this rationale is not applicable to this Court.

Second, the majority of the court concluded that preventing reliance on the legal fiction of the continuing accuracy of the census data would effectively preclude legislatures from replacing a court-drawn plan with their own even though courts have recognized such a prerogative. Eliminating the legal fiction would make voluntary redistricting more difficult; it would not, however, make it impossible. Instead, whether tweaking its own districts or those drawn by a court, the legislative body's burden would be consistent with its overriding constitutional duty to act in good faith to provide equal representation for equal numbers of people. Legislative bodies should not be free to ignore the real effects of a voluntary decision to

redraw representative lines (even when replacing a court-ordered plan). A legislature's right to redraw election district lines is important, but it does not trump the constitutional obligation of population equality among election districts. All redistricting is not equal in magnitude. A legislative body's burden of justification for voluntarily redrawing election district lines depends as a legal and practical matter on the magnitude and nature of the specific proposed changes.

Another reason given by the majority for not adopting *Amicus'* argument was that the majority could not discern why districts drawn in 2001 on the basis of 2000 census data are more equipopulous if measured against current census numbers than those in districts in a plan adopted in 2003 on the basis of the same 2000 census data. This observation misunderstands the *Amicus* argument. *Amicus* agreed in its trial brief that newly enacted districts could actually improve population equality among districts even though based on old, inaccurate census data. But the opposite also is possible – i.e., that the newly enacted districts could significantly worsen the malapportionment. The problem is that no one knows the effect of a new plan drawn on the basis of old census data. The available census enumeration is inaccurate and provides no answers. At best the legislative body is essentially guessing at the effects and playing dice with the voting rights of its citizens. At worst it may be acting for constitutionally impermissible reasons. Before undertaking to voluntarily replace an existing valid districting plan, a legislative body has a duty to determine by clear and convincing evidence that the new plan does not worsen the existing population inequality or that the new plan is justified by a compelling state interest. The legislative

body must be prepared to make such a showing in court if the new plan is challenged. Otherwise, the valid existing plan should remain in effect.

The majority of the court below questioned whether striking down the 2003 redistricting plan and thus reinstating the 2001 districting plan would make sense. After all, both are based on 2000 census numbers and neither would produce equipopulous districts for elections held in 2006. Taken in isolation, such a result may seem strange. However, the outcome in this case is of much greater importance than merely the determination of the districts to be used in the 2006 elections in Texas. If this Court upholds the 2003 plan, it will invite other state and local legislative bodies to engage in similar unnecessary mid-decade redistricting using old census data. A determination that the redistricting is void because violative of the Constitution will make clear that a legislative body is not free to redistrict at will using inaccurate population data. By reducing the incentives to redistrict, the effect may still some of the corrosive cynicism that politicians continuously rig the system for themselves; at least it will not exacerbate that cynicism.

A fourth reason given by the majority was that adoption of the *Amicus'* argument might lead to challenges to existing redistricting plans during a decade based on the inequality existing in those districts because of population shifts. The majority provides no explanation or support for this position. The *Amicus'* argument applies only to voluntary redistricting plans enacted to replace an existing valid plan. The rule poses no risk to valid existing plans that enjoy the necessary legal fiction that districts that are valid when created remain so until the next census. Chief Justice Warren established long ago that limitations on

the frequency of redistricting efforts are justified by the need for stability and continuity in the legislative system.[20] The rule urged by *Amicus* is a measure for stability, not an incentive for litigation.

Although it did not specifically give the fact that the 2001 redistricting plan was a court drawn plan as a reason for rejecting *Amicus'* argument, some wording in the majority opinion suggests that this was a concern. It should not be. The federal court ended up drawing the congressional plan in 2001 because Republican strategy at the time saw a court plan as preferable to one enacted with the agreement of the Democratic-controlled Texas House of Representatives. Moreover, some Republicans could see ahead that, if Republicans could secure control of the state house through redistricting in 2001, they would have a clear path to enacting an aggressive partisan congressional redistricting plan in 2003. Congressman DeLay and his aide Jim Ellis have openly acknowledged that a purpose behind the efforts of DeLay's now controversial organization, Texans for a Republican Majority, aimed at electing a Republican majority to the Texas House in 2002, was to make a new partisan congressional redistricting plan possible in 2003. Moreover, the plan adopted by the court in 2001 was, as required by the rules of this Court, a plan drawn with the full participation of the State of Texas and designed to embody and maintain identifiable, legitimate state interests and policies. Appellees have never identified any significant state interest that was not embodied in the court plan, or that justified, much less required, redrawing the court plan statewide.

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[20] *See Reynolds v. Sims*, 377 U.S. 533, 583 (1964).

Amicus recognizes that a state legislature could have justification for redoing a portion of a court plan to further a compelling state interest, but the partisan objectives in this case are not such a circumstance.[21] Using the federal courts as part of a long-term partisan strategy should not be rewarded.

Finally, the majority declined to accept *Amicus'* argument because it considered the argument too novel. There are times when a reader senses that Judges Higginbotham and Rosenthal came very close to adopting the *Amicus'* argument.[22] Nevertheless, ultimately they could not bring themselves to do so. None of the reasons given by the majority for rejecting *Amicus'* argument are founded in the jurisprudence of this Court nor are they sufficient reason not to apply the principle of equal representation for equal numbers of persons in a common sense manner that will protect individual citizen rights and representative government in this country.

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[21] Appellees have never shown a single instance in which the Texas Legislature (or the legislature of any other state for that matter) has significantly redrawn a court plan. *Amicus* in its response brief at trial showed how the Texas Legislature over 40 years had almost always either left court-drawn plans in place or enacted legislation embodying the court plan and maintaining the status quo.

[22] At the January 21, 2005 hearing, Judge Higginbotham indicated his concern over whether a lower court should "push forward its common-law power." He suggested, "The Supreme Court can take and do what it wants with it, I suppose . . . my reluctance has to do with . . . what should an inferior court do with this argument at this juncture." Transcript at 121-122 (January 21, 2005).

IV. Application of the Equal Population Requirement Provides a Common Sense, Easily Administered Means of Preventing the Harms Identified by the Appellants in this Case.

In *Vieth v. Jubelirer*,[23] several members of this Court expressed frustration with the Court's difficulty in finding a reliable and useable standard for measuring the unconstitutional dilution of the voting strength of a political group. Application in this case of the requirement that a legislative body must make a good faith effort to create districts of equal representation for equal numbers of people meets many of the concerns of the members of this Court.

First, the requirement of equal representation for equal numbers of persons is both justiciable and already a fundamental part of existing law. The "uniqueness" in this case is the extraordinary act of the Texas Legislature in replacing an existing lawful districting plan for partisan reasons, not the necessary adoption or application of any new principle of law. No partisan component of a legislative body should be entitled to enhance its partisan strength at the expense of possibly creating greater inequality among congressional or state legislative districts.

Second, the right to election districts as equal in population as practicable is an individual and personal right of each citizen. No partisan group necessarily benefits or suffers from the application or enforcement of this right. Therefore, the application of this principle in this and similar circumstances does not entail the recognition

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[23] 541 U.S. 267 (2004).

of any new right for any particular group, or the measurement of the effect of any districting plan on the voting strength of any specific political group.

Third, the event triggering the application of the principle in this case is readily apparent. If an existing districting plan is valid, any legislative replacement is subject to strict scrutiny.

Fourth, standards from previous applications of the equal population principle can readily be applied. For example, the standard establishing the prima facie unconstitutionality of certain redistricting plans because of a plan's deviation from absolute equality is firmly established. Such prima facie unconstitutionality merely shifts the burden to the state or local legislative body to justify the deviation. The same shift occurs in this circumstance. A new voluntary enactment is prima facie unconstitutional if based on inaccurate population data. The state or local legislative body can demonstrate that the new enactment is constitutional by showing by clear and convincing evidence that the changes in the new redistricting plan do not worsen the difference in real population equality among the districts, or that the risk of any increased inequality is justified by a compelling state interest and that the changes are narrowly tailored to meet that interest.

Fifth, federal courts are accustomed to considering the efficacy of a new redistricting plan against the benchmark of an existing plan. For example, the use of existing districting plans as benchmarks for determining the acceptability of new enactments regularly occurs under Section 5 of the Voting Rights Act of 1965. Similar to a Section 5 proceeding, one inquiry concerning a new voluntary

redistricting plan is whether it can be shown to be ameliorative (i.e., in regard to population equality) as compared to the existing plan. The burden rests with the legislative body that enacted the new plan. Given the fundamental nature of the individual right at stake, the legislative body's burden must be met by clear and convincing evidence to meet strict scrutiny.

Sixth, this Court has already resolved that redistricting for partisan advantage is not a compelling state interest. Partisanship may be an inevitable part of any redistricting, but it is not a state interest that justifies any variance from constitutional requirements. A state has a legitimate interest in drawing congressional districts "in a way that minimizes the number of contests between present incumbents."[24] The state interest being furthered by reducing incumbent contests[25] is the advantage to the state of preserving the seniority ranking in Congress of the members of its congressional delegation. This identifiable and legitimate "state" interest is distinct from the personal or partisan interests that may be at stake in the drawing of legislative districts designed to protect or to defeat certain incumbents or to provide an advantage to a particular political party.[26] Moreover, it is doubtful that

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[24] *Burns v. Richardson*, 384 U.S. 73, 89 n.16 (1966); *see White v. Weiser*, 412 U.S. 783, 791 (1973).

[25] In Texas in 2003, the congressional redistricting plan was designed to defeat incumbent Democrats. Six Democrats (with approximately 84 years of combined seniority in Congress) were defeated or forced from office by the redistricting. In some circumstances, the incumbent Democrats were purposefully paired with incumbent Republican congressmen in districts drawn to elect the Republican.

[26] *See Larios v. Cox*, 300 F.Supp.2d 1320, 1348 (N.D. Ga.), *aff'd*, *Cox v. Larios*, 124 S.Ct. 2806 (2004).

even the state interest in avoiding contests among incumbents could ever justify any deviation from absolute population equality.

Seventh, recognizing the invalidity of using old census data voluntarily to replace existing lawful districting plans does not affect the sufficiency of using such data for the design of redistricting plans intended to remedy unconstitutional or illegal plans. The need to use the census enumeration (as the best available data) in such circumstances is firmly established, is a compelling state interest, and is unaffected by the strict scrutiny required in this case, or similar circumstances.

Finally, application of the principle of equal representation for equal numbers of people to voluntary mid-decade redistricting is not equivalent to an outright ban on voluntary mid-decade redistricting, even for partisan reasons. It merely places the burden of justification where it belongs under the Constitution – i.e., on the legislative body. As a practical and legal matter, the amount of justification necessary in a particular circumstance will vary. For example, a minor redrawing of the boundary between two districts to resolve a local issue is unlikely to either incite opposition or to require great justification. Nevertheless, in view of its constitutional duty to act in good faith to provide districts of equal population, it would be prudent even in this circumstance for the legislative body to look closely at the effects of what it is doing. On the other extreme is a statewide redistricting affecting millions of persons, such as the 2003 redistricting in Texas. It is difficult to imagine that such a massive redrawing of election district lines statewide could be justified. Certainly it is not justified by the partisan reasons given by the Appellees in this case.

The principle of equal representation for equal numbers of people is not equivalent to the constitutional right of a political group to challenge the purposeful dilution of its voting strength; nor is it intended to substitute for such a right. Similarly, the principle is not equivalent to a new definition of unconstitutional or unlawful discrimination against racial or ethnic minorities. However, application of this principle to voluntary redistricting will dissuade legislative bodies from undertaking unjustified mid-decade redistricting and therefore will limit the opportunities available for using inaccurate census data to adversely affect the fundamental rights of individual voters, to disguise discrimination against minority groups, or to redistrict for solely partisan or special interest reasons.

CONCLUSION

For the foregoing reasons, *Amicus* urges this Court to reverse the decision of the United States District Court for the Eastern District of Texas.

Respectfully submitted,

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In the Supreme Court of the United States

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *ET AL.*,
APPELLANTS

v.

RICK PERRY, *ET AL.*, APPELLEES

AND CONSOLIDATED CASES

On Appeal From the United States District Court for the Eastern District of Texas

BRIEF FOR THE STATES OF UTAH, NEVADA, AND OHIO AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether the Constitution permits the States to draw congressional district lines based on data from the most recent decennial census and in a manner that results in a more accurate reflection of their citizens' statewide voting patterns.

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INTERESTS OF *AMICI CURIAE*

Amici strongly oppose appellants' effort in these cases to restrict the States' constitutional prerogative to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4. As this Court has repeatedly acknowledged, "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); accord *White* v. *Weiser*, 412 U.S. 783, 795 (1973). Although the Court has rightly held that judicial involvement in redistricting may be necessary to ensure compliance with the Voting Rights Act and certain constitutional mandates, "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995). Moreover, because "[e]lectoral districting is a most difficult subject for legislatures, *** the States must have discretion to exercise the political judgment necessary to balance competing interests." *Ibid.* Indeed, this Court has *never* struck down a State's congressional redistricting plan as an unconstitutional "partisan gerrymander."

Appellants nevertheless argue that, because Texas's redistricting plan was adopted mid-decade and (as usual) benefited one political party over another, the federal courts can and indeed *must* substitute their views of appropriate political representation for the views of elected state officials. Such a result would not only disregard the constitutional separation of powers—which expressly assigns to Congress rather than the courts the responsibility for supervising state redistricting decisions—but it would also denigrate the States' constitutional dignity. This Court has recognized that "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise

sometimes conflicting state apportionment policies in the people's name." *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977). Thus, as Justice Ginsburg has observed, "federalism and the slim judicial competence to draw district lines weigh heavily against judicial intervention in apportionment decisions." *Miller*, 515 U.S. at 934-935 (dissenting opinion).

Amici's purpose in filing this brief is *not* to take sides on an issue of partisan politics. To be sure, as with virtually all redistricting plans, the plan at issue here happened to benefit one political party. As sovereign States, however, *amici* have no interest in the partisan consequences of this case. Rather, they seek to ensure that *all* redistricting cases are governed by neutral legal principles and that the federal courts respect the constitutional limits on their role in resolving such cases. Accordingly, the principles that *amici* advocate here would apply with equal force in cases where the political parties' interests are reversed.

In short, *amici* seek to defend their traditional role, expressly mandated by Article I, § 4 of the Constitution, as the primary decisionmakers in congressional redistricting, and to urge the Court to reject the "unprecedented intervention in the American political process" that appellants urge here. *Vieth* v. *Jubelirer*, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

STATEMENT

These are "partisan gerrymandering" cases in which the appellants argue that the Texas legislature's 2003 alterations of the State's congressional districts violated the Equal Protection Clause of the Fourteenth Amendment and § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Appellants make two basic constitutional arguments. First, they say that Texas's redistricting plan is "unconstitutionally tainted by excessive partisan purpose" because it is "driven *solely* by a partisan agenda." App. 1a, 10a (emphasis added). Second, they contend that the "one person, one vote" principle

precludes state legislatures from engaging in "voluntary" mid-decade redistricting—*i.e.*, mid-decade redistricting that is not ordered by a court. *Id.* at 31a-39a.

Analyzing the issues here in light of this Court's decision in *Vieth*, a three-judge panel of the district court rejected these arguments and sustained the 2003 redistricting plan in its entirety. The court began by noting the historical context in which the Texas legislature enacted that plan. For roughly the first century after Reconstruction, one party, "the Democratic Party[,] dominated the political landscape in Texas." App. 10a-11a. Even as late as the 1960s and 1970s, the voting strength of the other major party "on a statewide basis hovered near 35%," during which time that party "never held more than four congressional seats at one time." *Id.* at 11a. Thus, "the Texas delegation has enjoyed non-competitive districts for at least the past four and one-half decades." *Id.* at 2a.

The Democratic Party's dominance gradually began to decline in the 1960s. As of 1990, however, they held 19 of the 27 Texas congressional seats. *Id.* at 12a. And in 1991, as Republicans were gaining statewide voting strength equal to the Democratic party, the latter party adopted a redistricting plan that enabled it to maintain a majority of congressional seats throughout the 1990s. *Ibid.* In 1992, for example, Democrats won 21 of 30 congressional seats "even though the 'tipping point' had been reached" with both parties "capturing an equal share of the vote in statewide races." *Ibid.* And in 2000, "Democrats captured seventeen congressional seats to the Republicans' thirteen * * *, despite Republicans garnering 59% of the vote in statewide elections." *Ibid.*

After the 2000 census, when the Texas legislature failed to reach agreement on new congressional districts, the district court itself imposed a plan that merely "perpetuated much of the 1991 Democratic Party gerrymander." *Id.* at 12a-13a. By 2003, however, the Republican Party controlled the Texas

legislature, and it adopted the redistricting plan at issue here. In 2004, that party carried 58% of the vote in statewide races, and they captured 21 congressional seats (66%) compared to 11 for the Democrats (34%). *Id.* at 13a. Appellants brought this lawsuit challenging the plan.

The panel rejected appellants' claim that "redistricting for purely partisan purposes" is "arbitrary and capricious" and "lack[s] a rational basis." App. 14a, 15a. For one thing, "the self-interest of members of the legislative body will inevitably be a 'but-for' cause of voluntary redistricting," but invalidating a redistricting plan for that reason "would contradict the long-standing assumption by courts that a state may replace existing court-imposed redistricting plans with plans enacted by the state's legislature." *Id.* at 18a.

More importantly, the court emphasized that it is not necessarily irrational to redistrict "solely for partisan advantage"—particularly where doing so "dismantl[es] a prior partisan gerrymander that had entrenched a minority party, in order to allow a party with overwhelming statewide voting strength to capture two-thirds of [its] congressional delegation." *Id.* at 25a. The court also declined to apply heightened scrutiny to appellants' claim, noting that they were "unable to locate a substantive right or suspect criterion to trigger strict scrutiny." *Id.* at 16a.

The panel also rejected appellants' claim that the "one person, one vote" principle does not allow voluntary, mid-decade redistricting. App. 31a-39a. The "practical effect" of such a rule, the court observed, "would be to bar what courts have stated was within the prerogative of the state legislatures: to draw their own map to replace one imposed by a court." *Id.* at 35a. In addition, "[i]ndexing liability to voluntary redistricting could create large incentives to seek judicial invalidation of an existing plan as violative of equipopulous requirements." *Id.* at 38a. In sum, the court below was unwilling to "apply an established doctrine in a novel way, with uncertain basis and effect." *Id.* at 39a.

The panel's decision thus "followed the unbroken line of cases declining to strike down a redistricting plan as an illegal partisan gerrymander." *Id.* at 8a.

SUMMARY OF ARGUMENT

I. The text and history of Article I, § 4 of the United States Constitution demonstrate that federal courts should rarely, if ever, intervene in partisan redistricting decisions. That provision authorizes state legislatures to prescribe the time, place, and manner of congressional elections, but also provides that Congress may "make or alter" such regulations at will. Article I thus subjects state redistricting decisions to federal *legislative* review: Congress may "alter"—*i.e.*, *rewrite*—state redistricting laws.

This extraordinary power is far broader than Congress's other Article I powers. Ordinarily, Congress must rely on the Supremacy Clause to preempt state law, but Article I, § 4 allows Congress to regulate state law *directly*. Section 4 gives Congress a "blue pencil" power—a power to "alter," in its discretion, state laws affecting congressional elections. Given the intrusive nature of federal legislative review of state laws in this area, federal courts should be loath to impose an additional layer of judicial review absent a clear constitutional mandate.

History confirms that the Framers were well acquainted with partisan gerrymandering and, after much debate, dealt with it by crafting a *political* solution. Opponents of Article I, §4 maintained that congressional review of state election law would enable Congress to manipulate the electoral process, but proponents convincingly argued that Congress needed the authority to override state laws that threatened its ability to establish a quorum and conduct business. Thus, state law would initially determine the full range of election-related issues, including districting issues, but Congress would have a robust supervisory power to check abuses by

state legislatures that could threaten Congress's very survival.

Congress, moreover, has not been shy about exercising its broad authority under Article I, § 4. Since 1842, it has enacted numerous restrictions on state regulations in this area. Moreover, the wide range of laws that it has adopted shows that it stands ready to adjust its level of oversight to reflect prevailing views on what sorts of regulations are needed to ensure fair political representation. Congress's active implementation of Article I, § 4 thus confirms that there is little need for further oversight by the federal courts.

In large part because of Congress' activity in this area, this Court historically has recognized that it generally lacks institutional competence to intervene in redistricting matters. Legislative redistricting is a thoroughly political enterprise, involving a complex interplay of geographic, economic, social, and historical interests. Legislatures are not only better able to weigh and reconcile such interests, but they are more accountable to the people when they fail to do so. By contrast, federal courts lack both the institutional ability to engage in principled line-drawing in redistricting cases and the democratic accountability that justifies undertaking the mediation of such disputes. Thus, the federal judicial role is properly limited to enforcing clear constitutional norms, such as equal protection, and laws such as the Voting Rights Act.

II. The fact that one political party benefited more than another from a new redistricting plan does not give rise to any presumption that the plan is unconstitutional. To begin with, the Framers were well aware that redistricting would inevitably disadvantage *someone*. Moreover, invalidating a plan as "excessively partisan" would be especially short-sighted where, as here, it brings congressional representation closer in line with statewide party voting patterns. As shown in the Appendix, the majority of States adopted redistricting plans after the 2000 census that resulted in congressional representation reflecting statewide party voting patterns in

the most recent presidential or gubernatorial elections. And inasmuch as *Vieth* sustained a plan that *weakened* the link between state-wide party voting patterns and the parties' congressional seats, it is plainly constitutional for a State to adopt a plan that *strengthens* that relationship. Finally, given the facts that many States gain or lose congressional seats after each census and legislatures typically enact redistricting plans that benefit a majority of its members (see Appendix), recognizing appellants' partisan gerrymandering claims would invite unprecedented intrusion by federal courts into partisan politics.

III. The Constitution also does not forbid the States to engage in voluntary mid-decade redistricting based on the most recent decennial census data. This Court has long recognized that the decennial census, for all its imperfections, remains the benchmark for compliance with the "one person, one vote" principle. Nothing in the Constitution limits the States' right to redraw congressional districts when they see fit, provided they do so in a manner that comports with substantive constitutional norms. Of course, the fact that federal courts may not prohibit mid-decade redistricting does not mean that Congress or the States may not do so.

ARGUMENT

I. Text And History Confirm That The Constitution Permits The Federal Judiciary To Intervene In Redistricting Decisions Only In the Most Unusual and Egregious Circumstances.

The Constitution does not contemplate the searching judicial review of quintessentially political decisions that appellants demand in these cases. The plain text of Article I, § 4 reposes in state legislatures, and ultimately in Congress, the power to regulate congressional elections. The Framers well understood the problems of legislative apportionment, and they viewed them as political in nature. Their solution—expressed in Article I, § 4—was to give one *legislative* body a check on another *legislative* body, thereby ensuring that the

problems associated with apportionment ultimately could be monitored by the people themselves, at the polls. Congress has exceeded even the Framers' expectations in its exercise of this supervisory authority, and its historic willingness to regulate congressional elections demonstrates that judicial review of redistricting decisions is unnecessary in all but the most extraordinary circumstances.

A. By conferring on State legislatures responsibility for redistricting, subject to unusually broad oversight by Congress, the Framers signaled that federal courts would rarely intervene in redistricting.

1. Article I, § 4 of the Constitution, which sets out the lawful means of regulating congressional elections in our system of government, provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Constitution thus places in state legislatures the primary responsibility for regulating election to Congress. Such regulation, however, is subject to federal *legislative* review: Congress may "alter"—*rewrite*—virtually any state law regarding the manner of holding congressional elections, including redistricting laws. As the second Justice Harlan observed: "States have plenary power to select their allotted Representatives in accordance with any method of popular election they please, subject only to the supervisory power of Congress," which "is exclusive." *Wesberry* v. *Sanders*, 376 U.S. 1, 23 (1964) (dissenting opinion).

The breadth of congressional power under Article I, § 4 is nothing short of extraordinary, and it is wholly unique in our constitutional order. In areas within its enumerated powers, Congress must ordinarily rely on the Supremacy Clause to override state laws that it deems objectionable. Congress may expressly preempt state law, or it may do so impliedly—

by "preempting the field" or relying on the judiciary to hold "conflicting" state law preempted. See generally *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Congress may give States a choice between regulating in accordance with federal law and having their law preempted, see *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), or it may condition the States' receipt of federal funds on their adoption of federal regulatory standards, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987). Moreover, where the Constitution authorizes Congress to enforce constitutional rights—such as the right of equal protection or the right to vote—it may directly regulate the conduct of state executive officials. See U.S. Const. amend. XIV, § 5; *id.* amend. XV, § 2; Voting Rights Act of 1965, 42 U.S.C. § 1973(b); 42 U.S.C. § 1983; *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Ex Parte Young*, 209 U.S. 123 (1908).

In none of these contexts, however, does the Constitution permit Congress to require the States to adopt or enforce specific laws, or to *rewrite* the States' laws. The judiciary on occasion exercises such powers of oversight, when striking down state laws that are unconstitutional or enjoining a State to adopt a particular legislative remedy to a problem. See *New York* v. *United States*, 505 U.S. 144, 179 (1992) (collecting cases). But "state legislatures are *not* subject to federal direction" from Congress. *Printz* v. *United States*, 521 U.S. 898, 912 (1997).

Indeed, this Court has emphatically held that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *New York*, 505 U.S. at 161 (citation omitted). As Justice O'Connor has explained, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *Id.* at 166. Thus, "[n]o matter how powerful the federal interest involved, the Constitution simply does not give Congress the

authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation." *Id.* at 178.

Enter Article I, § 4. That provision empowers Congress not only to "make" its *own* regulations governing the time, place, or manner of holding congressional elections, but also to "alter" *state* regulations on the subject. Article I, § 4 gives Congress a "blue pencil" power: it may rewrite or amend, to whatever extent deemed necessary and appropriate, state laws regulating congressional elections. In this area, and this area alone, the Framers were not content to let Congress rest on its power to preempt troubling state laws; they gave Congress the power to regulate state law *directly*—a power to amend state law that is tantamount to a power of legislative commandeering. The unique nature of Article I power over congressional elections thus reflects the unique importance of Congress's ability to maintain itself. See *Wesberry*, 376 U.S. at 42 (Harlan, J., dissenting) ("The constitutional scheme vests in the States plenary power to regulate the conduct of elections for Representatives, and, in order to protect the Federal Government, provides for congressional supervision of the States' exercise of their power").

The uniquely intrusive nature of federal *legislative* review of state laws regulating congressional elections is a powerful reason why the courts should not impose an additional layer of *judicial* review. Congress has nearly absolute authority to override state judgments in this arena; the only substantive limitation on Congress is that it may not regulate "the Places of chusing Senators." There is no "presumption against preemption" of state laws concerning elections to Congress, and Congress's review of state laws is effectively *de novo*.

It follows that, apart from circumstances in which the courts are enforcing some other constitutional norm (such as equal protection, see *Shaw* v. *Reno*, 509 U.S. 630 (1993)) or a provision of a federal law (such as the Voting Rights Act, 42

U.S.C. § 1971 *et seq.*), imposing judicial oversight on top of Congress's review would be an unwarranted interference with the ability of state legislatures to regulate congressional elections. As Justice Frankfurter once explained: "Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress." *Colegrove* v. *Green*, 328 U.S. 549, 554 (1946); accord *Wesberry*, 376 U.S. at 33 (Harlan, J., dissenting).

2. Due in large part to its unparalleled breadth, Article I, § 4 sparked intense debate at the Constitutional Convention and in the States. At the Convention, the proposal that Congress should have supervisory power to "make or alter" regulations for congressional elections met with immediate opposition. South Carolina delegates Charles Cotesworth Pinckney and John Rutledge moved that this provision be deleted from the draft Constitution because the States "could [and] must be relied on in such cases." 2 Max Farrand, *Records of the Federal Convention of 1787*, at 240 (1966).

James Madison responded by noting the probability that "[w]henever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed." *Id.* at 241. In other words, the process of regulating elections *necessarily* involved political calculation and was prone to mischief. The answer, Madison argued, was to give Congress—a *political* body answerable directly to the people—a check against abuses by the state legislatures. According to Madison, "the Legislatures of the States ought not to have the *uncontrouled* right of regulating the times places [and] manner of holding elections." *Id.* at 240 (emphasis added).

Although Article I, § 4 gave Congress broad supervisory authority, Madison presumed that the States would continue to determine (in the first instance) the full range of election-related issues: "[w]hether the electors should vote by ballot or viva voce, should assemble at this place or that place,

should be divided into districts or all meet at one place, *[should] all vote for all the representatives; or all in a district vote for a number allotted to the district.*" *Ibid.* (emphasis added). Except in extraordinary circumstances, the States would regulate congressional districting.

Madison prevailed, and the Convention agreed to retain the supervisory-authority provision in Article I, § 4. See 2 Farrand, *supra*, at 241. Proponents of the Constitution in the States frequently argued that the very existence of Congress depended upon its ability to regulate the elections of its members, since a combination of States might decline—as Rhode Island had earlier declined—to send representatives to Congress and thus deprive that body of the quorum needed to govern.[1] Opponents of this supervisory authority warned

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[1] For example, James Wilson argued in Pennsylvania that it was "highly proper that the federal government should throw the exercise of this power [to regulate congressional elections] into the hands of the state legislatures; but not that it should be placed there entirely without control," because "[s]ome states might make no regulations at all on the subject," leaving the national government to "lie prostrate at the mercy of the legislatures of the several states." II Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 440-441 (2d ed. 1888); see also III Elliot, *supra*, at 367 (James Madison) ("It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution"); II Elliot, *supra*, at 326 (John Jay) ("Suppose that, by design or accident, the states should *neglect to appoint representatives*; certainly there should be some constitutional remedy for this evil. The obvious meaning of the paragraph was, that, if this neglect should take place, Congress should have power, by law, to support the government, and prevent the dissolution of the Union"); *ibid.* (Robert Morris) ("[I]t was absolutely necessary that the existence of the general government should not depend, for a moment, on the

that the members of Congress, who already possessed extraordinary power under the Constitution, should not also be given the ability to *retain* power by manipulating the electoral process, especially the location of polling places.[2]

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will of the state legislatures. The power of perpetuating the government ought to belong to their federal representatives; otherwise, the right of the people would be essentially abridged"); see generally III Joseph Story, *Commentaries on the Constitution of the United States* § 410 (1833).

[2] "[B]y this power to regulate elections," argued a Colonel Jones in Massachusetts, "Congress might keep themselves in to all duration." II Elliot, *supra*, at 28; see also III Elliot, *supra*, at 60 (Patrick Henry) ("The control given to Congress over the time, place, and manner of holding elections, will totally destroy the end of suffrage. The elections may be held at one place, and the most inconvenient in the state; or they may be at remote distances from those who have a right of suffrage: hence nine out of ten must either not vote at all, or vote for strangers"); II Elliot, *supra*, at 30 (Mr. Turner) ("[T]hey may order that it may be at the extremity of a state, and, by their influence, may there prevail that persons may be chosen, who otherwise would not; by reason that a part of the qualified voters, in part of the state, would be so incommoded thereby, as to be debarred from their right as much as if they were bound at home"); 2 Herbert J. Storing, *The Complete Anti-Federalist* 386 (1981) (Brutus) ("The proposed Congress may make the whole state one district, and direct, that the capital (the city of New-York, for instance) shall be the place for holding the election; the consequence would be, that none but men of the most elevated rank in society would attend, and they would as certainly choose men of their class"); 4 Storing, *supra*, at 42-43 (*Vox Populi*) ("What, then, would be the case if Congress should think proper to direct, that the elections should be held at the north-west, south-west or north-east part of the state, the last day of March? How many electors would there attend the business?"); *id.* at 142-143 (Cornelius) ("This power being vested in the Congress, may enable them, from time to time, to throw the elections into such particular parts of the several States where the dispositions of the people shall appear to be the most subservient to the wishes and views of that

In Federalist No. 59, Alexander Hamilton summarized the reasons both for granting Congress a supervisory authority over congressional elections and for limiting the exercise of such authority. According to Hamilton, the necessity of the supervisory authority "rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation." *The Federalist Papers* 299 (Garry Wills ed. 1982). To ensure Congress's preservation, the power to regulate the election of members could not be lodged exclusively in state legislatures: "[E]very period of making [elections] would be a delicate crisis in the national situation; which might issue in a dissolution of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election." *Id.* at 302.

At the same time, however, Hamilton acknowledged the concern that Congress, no less than the state legislatures, might abuse its power to regulate elections. Thus, Hamilton assured his audience that federal intervention would be the exception, not the rule. The Constitution "submitted the regulation of elections for the Federal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but [it has] reserved to the national authority a right to interpose, *whenever extraordinary circumstances might render that interposition necessary to its safety.*" *Id.* at 300 (emphasis added).

As this history makes clear, the Framers fully expected that legislative districting decisions would be heavily influenced by political agendas. Recognizing that this problem was fundamentally one of *politics*, however, the Framers crafted a *political* solution: assigning the power to regulate elections to the States, subject to an ultimate

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honourable body; or, where the interests of the major part of the members may be found to lie"); see generally III Story, *supra*, § 409.

supervisory authority in Congress. As the Framers envisioned it, the supervisory power of Congress—which, as noted above, was quite robust—would be invoked in only the most unusual circumstances, where the very survival of the national government depended upon its exercise.

B. Congress's historical willingness to exercise its supervisory authority significantly reduces the need for judicial intervention under the Constitution.

Not surprisingly, Congress has made much more of its supervisory power than the Framers anticipated. Although Congress did not enact apportionment legislation until 1842, it has repeatedly exercised its supervisory authority since then. And the statutes it has enacted reflect changing views of the legal requisites for fair political representation.

"Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting." *Colegrove*, 328 U.S. at 555. Congress responded to this lack of uniformity by passing the Apportionment Act of 1842, which provided both that "the House of Representatives shall be composed of members elected agreeably to a ratio of one Representative for every [7680] persons in each State," and that the members "shall be elected by districts composed of contiguous territory equal in number to the number of Representatives to which [the] States may be entitled, no one district electing more than one Representative." 5 Stat. 491, 491. Congress again imposed these requirements in 1862. 12 Stat. 572, 572.

Ten years later, but long before the advent of this Court's "one person, one vote" doctrine, see *Wesberry*, 376 U.S. at 7-8, 18, Congress added another requirement for congressional districting—that the districts "contain[] as nearly as practicable an equal number of inhabitants." 17 Stat. 28, 28. Apportionment statutes passed in 1882 (22 Stat. 5) and 1891 (26 Stat. 735) repeated the requirement that Representatives

be elected from single-member districts composed of contiguous territory and nearly equal populations.

In 1901, Congress added yet another requirement for congressional districting, this time mandating that districts be "compact." 31 Stat. 733, 734. The 1911 apportionment statute included the same requirement. See 37 Stat. 13, 14. Thus, in the nearly seventy years from 1842 to 1911, Congress exercised its supervisory authority under Article I, § 4 to mandate the election of Representatives by (1) single-member districts that were (2) equipopulous, (3) composed of contiguous territory, and (4) compact.

Not all of these requirements, however, were understood to be inviolable principles of fair representation, for in 1929 Congress enacted an apportionment statute that "did not carry forward those requirements as previous apportionment acts had done." *Wood* v. *Broom*, 287 U.S. 1, 6 (1932). Although the original bill included all of the elements of the prior statutes, "the House of Representatives, after debate, struck out these provisions." *Id.* at 7. Some Representatives later attempted to insert the deleted provisions back into the bill, but that attempt was defeated. *Ibid.* Given this history, the Court in *Wood* concluded that "[i]t was manifestly the intention of the Congress not to re-enact the provision as to the compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929." *Ibid.* As the second Justice Harlan later noted, "[t]he likely explanation for the omission is suggested by a remark on the floor of the House that 'the States ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have.'" *Wesberry*, 376 U.S. at 44 (dissenting opinion).

Although Congress again amended its apportionment statute in 1940 (54 Stat. 162) and 1941 (55 Stat. 761), it did not revive the former requirements of single-member districts,

equal population, contiguity, or compactness. In 1967, however, Congress required that Representatives be elected from single-member districts. 81 Stat. 581, 581. This provision remains in effect today. See 2 U.S.C. § 2c.

This history of congressional action confirms beyond any doubt that Congress's supervisory authority under Article I, § 4 is a powerful tool to oversee and check the States' regulation of congressional elections. This history also shows that Congress has been willing to ratchet up (or down) its level of oversight, depending upon the perceived necessities of the time. Although Congress has invoked Article I, § 4 more often than the Framers anticipated, the process of give and take over election rules is just what they expected.

C. This Court historically has declined to invoke the Constitution as a basis for intervening in redistricting, leaving such matters to legislatures, which have greater institutional competence in this area.

This Court has long acknowledged the fact—so plainly appreciated by the Framers—that legislative districting is a thoroughly *political* enterprise. Indeed, "[t]he one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests." *Colegrove*, 328 U.S. at 554. As Justice O'Connor has noted: "The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level. Thus, the legislative business of apportionment is fundamentally a political affair, and challenges to the manner in which an apportionment has been carried out—by the very parties that are responsible for this process—present a political question in the truest sense of the term." *Davis* v. *Bandemer*, 478 U.S. 109, 145 (1986) (concurring opinion). In

short, "[l]egislative districting is highly political business." *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting).

Not only does judicial intervention in political gerrymandering cases "inject the courts into the most heated partisan issues," *Davis*, 478 U.S. at 145 (O'Connor, J., concurring), but it also contravenes the Constitution's separation of powers. Reapportionment "is primarily a matter for legislative consideration" (*White*, 412 U.S. at 794) that necessarily involves a "complex interplay of forces" that must be identified, weighed, and mediated or compromised (*Miller*, 515 U.S. at 915-916). In terms of both institutional competence and political accountability, legislatures are better positioned than courts to assume responsibility for redistricting. As the Court explained in *Connor*, "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." 431 U.S. at 414-415. Similarly, Justice Ginsburg has observed that "[d]istrict lines are drawn to accommodate a myriad of factors—geographic, economic, historical, and political—and state legislatures, as arenas of compromise and electoral accountability, are best positioned to mediate competing claims." *Miller*, 515 U.S. at 936 (dissenting opinion).

By contrast, the federal courts "possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name." *Connor*, 431 U.S. at 415. In the exercise of judicial authority, courts define rules and standards that must govern all similar cases; *ad hoc* compromise, by contrast, is the hallmark of legislative process. Whereas "[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc"—reflecting political compromise—"law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality opinion).

This Court's inability to reach consensus on the appropriate standard for review of partisan gerrymandering cases confirms the political nature of the enterprise. See *id.* at 306-307 (Kennedy, J., concurring) (noting the "lack of comprehensive and neutral principles for drawing electoral boundaries"); *id.* at 318 (Stevens, J., dissenting) ("[W]e have not reached agreement on the standard that should govern partisan gerrymandering claims"). Indeed, the court below lamented "the difficulty * * * of divining rules or standards adequate to distinguish a judicial decision resolving issues of partisanship in redistricting from a legislative act," suggesting that lower courts were resigned to "the indefensible position of undertaking a task they cannot perform." App. 8a-9a. As one commentator has noted, "[i]n the case of partisan gerrymandering, it is virtually impossible to devise judicially manageable standards that distinguish between legitimate and illegitimate districting schemes," and "it would be absurd to hold that politicians cannot take politics into account in making the most political of all decisions." Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 Harv. J.L. Pub. Pol. 103, 113-114 (2000). Recognizing the political nature of the enterprise, the Framers delegated the regulation of congressional elections to two different *legislatures*.

Given the clear textual commitment to the States and Congress of regulations concerning congressional elections; the historical evidence demonstrating that the Framers fully appreciated the political nature of the problem and settled on a political solution; Congress's willingness to exercise its supervisory powers; the Court's recognition that legislatures are better positioned than courts to bear responsibility for reapportionment and redistricting; and the separation of powers difficulties that attend judicial supervision in this area, the Court should not now accept appellants' invitation to inject itself into a quintessentially *political* dispute. Federal courts should not undertake "substantial intrusion into the

Nation's political life" without a clear constitutional mandate. *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). There is no such mandate here.[3]

II. The Fact That A Political Party Benefited From A Redistricting Decision Does Not Give Rise To Even A Presumption Of Unconstitutionality.

Contrary to the appellants' view, the fact that a redistricting plan benefits one party at the expense of another does not render it suspect, let alone unconstitutional. The Framers well understood that redistricting would *inevitably* favor one political group over others, and that is no less true today. Moreover, striking down a redistricting plan on the basis of "excessive partisan advantage" would be especially inappropriate where, as here, the effect of the plan is to bring congressional representation closer in line with statewide voting patterns. Indeed, inasmuch as *Vieth* upheld a plan that *weakened* the relationship between state-wide voting patterns and the parties' congressional seats, it is easily valid for Texas to adopt a plan that *strengthens* that relationship and thus "dismantle[s] a prior partisan gerrymander that had entrenched a minority party." App. 25a. Recognizing appellants' partisan gerrymandering claims here would invite significant intrusion by federal courts into the States' handling of ordinary political disputes.

1. As shown above, the Framers well understood the risk that elected officials would manipulate electoral processes for

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[3] We agree with the plurality in *Vieth* that political gerrymandering claims should be nonjusticiable, but the Court need not revisit that issue to resolve this case. Moreover, we readily acknowledge that the Fourteenth and Fifteenth Amendments, as well as the Voting Rights Act, justify a far broader role for federal courts in resolving claims of racial gerrymandering. See *Shaw*, 509 U.S. at 657; *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring); *Davis*, 478 U.S. at 160-161 (O'Connor, J., concurring).

their own benefit. As early as 1702, "[t]he practice of refusing to establish additional election districts when convenience and justice required was followed by the governors whenever they feared the new members would not support their policy." Elmer C. Griffith, *The Rise and Development of the Gerrymander* 26 (reprint ed. 1974). By the time the Framers convened in Philadelphia, examples of political gerrymandering had already been seen in New York, Pennsylvania, and North Carolina. See *id.* at 26-29, 120-121. In light of this recent experience, James Madison predicted that state legislatures, in regulating congressional elections, would "mould their regulations as to favor the candidates they wished to succeed." 2 Farrand, *supra*, at 241. Likewise, Charles Cotesworth Pinckney ultimately approved of Congress's oversight powers "lest, by the intrigues of a ruling faction in a state, the members of the House of Representatives should not really represent the people of the state." IV Elliot, *supra*, at 303.

2. Regulating congressional elections is no less a political business today. See *Miller*, 515 U.S. at 934 (Ginsburg, J., dissenting); *Davis*, 478 U.S. at 145 (O'Connor, J., concurring). As this Court has recognized: "The reality is that districting *inevitably* has and is intended to have substantial political consequences." *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973) (emphasis added).

It would be particularly inappropriate to invalidate for "excessive partisanship" a redistricting plan that reflects statewide voting patterns more accurately than the previous plan. As the Court explained in *Gaffney*, "reflect[ing] the relative strength of the parties in locating and defining election districts" is a wholly legitimate goal in redistricting, and "neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to

recognize it and, through districting, provide a rough sort of proportional representation." *Id.* at 752, 754.

That is precisely what the Texas legislature accomplished in its 2003 redistricting plan. As the court below found (App. 10a-12a), Texas's congressional representation did not fairly reflect the State's voting patterns, as the minority party in statewide voting held a decided advantage in the State's congressional elections. The 2003 redistricting plan remedied that situation: in 2004, the majority party in statewide voting also won a majority of congressional seats. *Id.* at 13a.

The 2003 plan was anything but anomalous. Of the 35 state redistricting plans implemented without judicial intervention after the 2000 census, 28—including Texas—produced congressional delegations in which the majority party matched the State's preference in the 2000 presidential election. See Appendix. The plans in 21 States—including Texas—produced congressional delegations in which the majority party reflected the State's preference in the most recent gubernatorial election. *Ibid.* Had the Texas legislature *not* implemented a new redistricting plan in 2003, Texas would have been one of only three States (Arkansas and Tennessee are the others) in which the majority party in the congressional delegation was not the party preferred by the State's voters in the preceding presidential *or* gubernatorial election. *Ibid.*

The fact that the 2003 redistricting plan produced this result hardly condemns the plan, as appellants contend. To the contrary, this fact commends the plan, because it shows that the plan achieved a legitimate goal for redistricting—an accurate reflection of voters' political preferences. See *Gaffney*, 412 U.S. at 753 (stating that "[t]he very essence of districting" is to produce a result that is more "politically fair" than would otherwise occur). For the first time in 14 years, the party with the majority of the statewide vote also held a majority of the congressional seats. And as this Court

has recognized, "judicial interest should be *at its lowest ebb* when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754 (emphasis added).

Given the inevitability that elected officials charged with drawing congressional districts will seek to maximize their political interests, it can only be considered a success when, as here, the redistricting plan they produce reasonably reflects the statewide voting patterns of their constituents. In short, appellants' contention that partisan motives invalidate the 2003 redistricting plan cannot be reconciled with this Court's decisions, or with common sense.

3. This Court's decision in *Vieth* confirms that attempting to bring a congressional delegation into line with the parties' apparent statewide strength is a lawful legislative purpose. The Court there rejected a partisan gerrymandering challenge to a Pennsylvania redistricting plan that, according to the facts on which the Court relied, was adopted "as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans *elsewhere*." 541 U.S. at 272 (emphasis added). Prior to adoption of that plan, Republican candidates captured 48 percent of the statewide vote versus 47 percent for Democratic candidates, and Republicans won 11 seats for Congress (52%), versus 10 for Democrats (48%). Thus, there was a close correspondence between the statewide numbers and congressional representation. App. 25a. After adoption of the plan, however, Republicans captured 12 of 19 congressional seats (63%) despite garnering only 46 percent of the statewide vote, versus 51 percent for Democrats. The new redistricting plan thus *increased* the disparity between the parties' representation in the congressional delegation and their apparent statewide strength.

If it was valid for Pennsylvania to adopt a redistricting plan that gave Republicans 63 percent of its congressional seats while gaining only 46 percent of the statewide vote—thus *weakening* the link between the parties' statewide numbers and their congressional representation—then surely Texas may adopt a plan under which Republicans gain 66 percent of the State's congressional seats while gaining 58 percent of the statewide vote. Indeed, whereas the plan in *Vieth* was allegedly adopted as payback for Democratic gerrymandering in *other* States, the plan here was adopted to "dismantle a prior partisan gerrymander that had entrenched a minority party" *in Texas* and to "bring [the] congressional delegation more in line with the parties' apparent statewide strength." App. 25a. In sum, affirmance here should follow *a fortiori* from this Court's decision in *Vieth*.

4. Recognizing appellants' partisan gerrymandering claims would also result in frequent and "unprecedented [judicial] intervention in the American political process." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring). The necessity of redistricting, combined with the certainty that States will gain and lose seats in Congress as the result of each decennial census, ensures that there will be more opportunities for political gerrymandering. Recent experience also makes clear that the "losers" under any redistricting plan will demand a judicial, rather than a political, remedy.

That prospect is highlighted by the aftermath of the 2000 census, as a result of which eighteen States gained or lost congressional seats. See Congressional Quarterly, *CQ's Politics in America 2002*, at xxiv (2001). Thus, redistricting in those States necessarily affected the makeup of congressional delegations. In eight such States, one party dominated the legislature and thus controlled redistricting. See Appendix. And in each of those States the party in charge of redistricting produced a plan that was favorable to its own members. *Ibid.*

For example, Florida and Texas gained additional seats as a result of the 2000 census, and Republican legislatures in those States enacted redistricting plans that resulted in Republican gains in the congressional delegation. *Ibid.* California, Georgia, and North Carolina also gained additional seats in Congress, and in those States Democratic legislatures enacted redistricting plans that resulted in Democratic gains. *Ibid.* As the Court is aware, Pennsylvania lost two seats after the 2000 census, and its Republican legislature enacted a plan that resulted in the Democrats' losing three congressional seats. *Ibid.* This pattern of redistricting in the States that gained or lost congressional seats after the 2000 census can be expected to recur after each census.

Of course, the simple fact that a redistricting plan results in favorable treatment for the party controlling redistricting cannot itself establish a constitutional claim. If it did, the party out of power in the state legislature would inevitably go to court, arguing that the plan's results were evidence of improper motives or animus. Courts would find themselves ever more entangled in the "political thicket." *Colegrove*, 328 U.S. at 556. Now, almost twenty years after *Davis* v. *Bandemer*, there still is no settled standard by which to evaluate political gerrymandering claims. See 541 U.S. at 279-281; *id.* at 307-308 (Kennedy, J., concurring); *id.* at 318 (Stevens, J., dissenting). Thus, just as the Court "refrain[ed] from directing [a] substantial intrusion into [Pennsylvania's] political life" in *Vieth*, so too should the Court refrain from doing so in Texas or any other State. *Id.* at 306 (Kennedy, J., concurring).

III. The Constitution Permits The States To Redraw Congressional Districts Mid-Decade Based On The Most Recent Decennial Census Data.

The fact that a districting plan is redrawn in mid-decade also provides no basis for constitutional scrutiny. Indeed,

appellants' argument that the "one person, one vote" principle requires use of updated population data would effectively prohibit all mid-decade redistricting and require federal courts to impose their own redistricting plans immediately upon finding constitutional flaws in state plans.

1. Under appellants' theory, a redistricting plan enacted just *three years* after the decennial census on which it is based—and just two years after the earliest conceivable date on which the state legislature might have acted—violates the "one person, one vote" principle because it cannot adequately reflect the population that existed at the time of that census. But this argument assumes, contrary to this Court's decisions and common sense, that the decennial census provides a precisely accurate description of relevant populations at the start of a decade and that population shifts occur steadily and in just one direction over the course of that decade.

In fact, the decennial census does not provide a precise measure of the gross population in a State, much less the voting population. "The United States census is more of an event than a process. It measures population at only a single instant in time." *Gaffney*, 412 U.S. at 746. Moreover, as the Court noted in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), the census "may systematically undercount population, and the rate of undercounting may vary from place to place." *Id.* at 738. In short, "the census data are not perfect." *Id.* at 732.

Even a precisely accurate census would not provide perfect information for districting purposes, "because 'census persons' are not voters." *Gaffney*, 412 U.S. at 746. As Justice White observed in *Karcher*, "a substantial percentage of the total population is too young to register or is disqualified by alienage," and "census figures cannot account for the proportion of all those otherwise eligible individuals who fail to register." 462 U.S. at 771-772 (dissenting opinion). See

McConnell, *supra*, at 110-111 (explaining differences between population and "voting-eligible population").

Moreover, population shifts are hardly as predictable as appellants suggest. "District populations are constantly changing, often at different rates in either direction, up or down. Substantial differentials in population growth rates are striking and well-known phenomena." *Gaffney*, 412 U.S. at 746. On account of the "well-known restlessness of the American people," decennial census data for particular districts "are outdated long before they are completed." *Karcher*, 462 U.S. at 732. Given these ever-occurring population shifts, it is inevitable that "districts will be malapportioned—in percentages far exceeding those in *Karcher*—most of the time. Voters in districts of declining population will be overrepresented relative to voters in districts of increasing population." McConnell, *supra*, at 110.

Despite these inherent—and obviously consequential—limitations, the Court has described the decennial census as the "best population data available," *Karcher*, 462 U.S. at 738, and it remains the standard by which the States and federal courts measure compliance with the "one person, one vote" principle. Indeed, the Court has admonished the States that, whatever its structural flaws, the decennial census "is the only basis for good-faith attempts to achieve population equality." *Ibid.* The Court's commitment to the decennial census as the benchmark for compliance with the "one person, one vote" rule is further demonstrated by its approval of the "legal fiction" that redistricting plans based on such data satisfy the principle throughout the decade preceding the next census, even though more current data might prove the opposite. *Georgia* v. *Ashcroft*, 539 U.S. 461, 488 n.2 (2003).

Appellants suggest that a State should not benefit from this presumption when it engages in mid-decade redistricting. But this argument has no limiting principle. A

"mid-decade" redistricting is any redistricting that occurs after the initial attempt. Whether it occurs two or eight years after the census, appellants would complain that the new plan violates the "one person, one vote" rule because the relevant populations have changed over time.

Appellants' argument also runs headlong into this Court's decision in *Reynolds* v. *Sims*, 377 U.S. 533 (1964). There, this Court specifically contemplated that States might reapportion their legislatures more often than every ten years. *Id.* at 583-684. Although "[d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth," it is by no means the *only* approach that the Constitution permits. *Id.* at 583.

Such an approach would also conflict with this Court's own instructions to federal courts in redistricting cases. For example, the Court in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), noted that when federal courts intervene in redistricting, their mandate continues "pending later legislative action." *Id.* at 540. Thus, if a federal court invalidates an existing state plan, the remedy is not to impose a valid plan immediately but to "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure." *Ibid.* Such a substitute measure would continue in effect until "it, too, is challenged and found to violate the Constitution." *Ibid.* Thus, several years may pass between a census and the ultimate implementation of a constitutional redistricting plan, but that fact does not undermine the plan's validity.

2. The logical implication of appellants' theory is that a federal court finding a constitutional infirmity in a State's proposed redistricting plan must impose a valid plan immediately, so that the voting rights of citizens in the affected congressional districts will not further be infringed. Such a result is contrary to this Court's clear instructions that

redistricting and reapportionment are "legislative task[s]" committed primarily to the States (*Wise*, 437 U.S. at 539; *White*, 412 U.S. at 794-795); and that federal courts may not simply substitute their judgments about fair representation for those of state legislatures (*Upham* v. *Seamon*, 456 U.S. 37, 40-41 (1982) (*per curiam*); *White*, 412 U.S. at 795).

Indeed, given Article I's clear commitment of redistricting decisions to the States, the rule is settled that "[w]hen a federal court declares an existing apportionment scheme unconstitutional," it should "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise*, 437 U.S. at 540. Appellants' argument is wholly inconsistent with this rule, and with a constitutional scheme in which state legislatures, rather than federal courts, are the primary arbiters of redistricting.

3. Of course, the fact that the federal courts may not prohibit mid-decade congressional redistricting does not mean that Congress or the States may not do so. The validity of mid-decade congressional redistricting is a fundamentally political issue on which legislatures may differ, and to date Congress and most States have not felt it necessary to ban it. But Article I, § 4 provides sufficient authority for Congress to do so, and a handful of States have already taken action in this regard. For example, the statutes or constitutions of at least six States expressly prohibit mid-decade congressional redistricting;[4] the highest courts in California and Colorado have each held that their state constitutions bar serial

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[4] See Ariz. Const. art. IV, pt. 2, § 1; Conn. Const. art. III, § 6; Mont. Const. art. V, § 14; N. J. Const. art. II, § II, ¶ 8; Tenn. Code Ann. § 2-16-102; Wash. Rev. Code § 44.05.030.

redistricting;[5] and at least sixteen States prohibit mid-decade alteration of *state* legislative districts.[6] Other States expressly authorize their legislatures to redistrict at any time.[7]

In short, activity at the state level confirms two things: first, the validity of mid-decade redistricting is an issue on which States reasonably disagree; and second, federal court intervention is unnecessary because elected officials are fully able to enact a prohibition on mid-decade redistricting if, in their considered judgment, it is necessary to do so.

* * * * *

We again emphasize that the position we advocate is one of principle, not politics. Republicans benefited from the 2003 Texas redistricting plan; Democrats benefited from the 1991 Texas redistricting plan; and time alone will tell which party will benefit from future plans. The neutral principle of deference to state legislatures, however, can and should be applied regardless of which party happens to hold power in any particular legislature at any particular time.

CONCLUSION

The decision below should be affirmed.

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[5] See *Legislature* v. *Deukmejian*, 669 P.2d 17, 24-25 (Cal. 1983) (*en banc*); *People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221, 1237-1240 (Colo. 2003).

[6] See Ala. Const. art. IX, §§ 198, 200; Conn. Const. art. III, § 6; Del. Code Ann. tit. 29, § 805; Haw. Const. art. IV, §§ 1, 2; Mass. Const. amend. art. CI, § 2; Mont. Const. art. V, § 14; N.M. Const. art. IV, § 3; N.C. Const. art. II, §§ 3, 5; Ohio Const. art. XI, §§ 1, 6; Pa. Const. art. II, § 17; Tenn. Code Ann. §§ 3-1-102, -103; Wash. Rev. Code § 44.05.030.

[7] *E.g.*, S.C. Const. art. VII, § 13 ("The General Assembly may at any time arrange the various Counties into Judicial Circuits, and into Congressional Districts *** as it may deem wise and proper"); Wyo. Const. art 3, § 49 ("Congressional districts may be altered ~~from time~~ to time as public convenience may require").

Respectfully submitted.

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CONGRESSIONAL REDISTRICTING IN THE STATES FOLLOWING THE 2000 CENSUS

State	Year	Party in Control of Redistricting	Congressional Seats Before Redistricting	Congressional Seats After Redistricting	Previous Vote for President	Previous Vote for Governor
AL	2002	D	5R / 2D	5R / 2D	R (56-42)	D (58-42)
AK						
AZ	2001	Commission	5R / 1D	6R / 2D	R (51-45)	R (61-36)
AR	2001	D	3D / 1R	3D / 1R	R (51-46)	R (60-40)
CA	**2001**	**D**	**32D / 20R**	**33D / 20R**	**D (53-42)**	**D (58-38)**
CO	2002	Court-imposed	4R / 2D	5R / 2D	R (51-42)	R (49-48)
CT	2001	Commission	3R / 3D	3R / 2D	D (56-38)	R (56-44)
DE						
FL	**2002**	**R**	**15R / 8D**	**18R / 7D**	**R (49-49)**	**R (55-45)**
GA	**2001**	**D**	**8R / 3D**	**8R / 5D**	**R (55-43)**	**D (52-44)**
HI	2002	D	2D	2D	D (56-37)	D (50-49)
ID	2001	Commission	2R	2R	R (67-28)	R (68-29)
IL	2001	Split	10R / 10D	10R / 9D	D (55-43)	R (51-47)
IN	2001	Commission	6R / 4D	6R / 3D	R (57-41)	D (57-42)
IA	2001	Legislative Services Bureau	4R / 1D	4R / 1D	R (50-49)	D (52-47)
KS	2002	R	3R / 1D	3R / 1D	R (58-37)	R (73-23)
KY	2002	Split	5R / 1D	5R / 1D	R (57-41)	D (61-22)
LA	**2002**	**D**	**5R / 2D**	**4R / 3D**	**R (53-45)**	**R (62-30)**
ME	2003	Court-imposed	2D	2D	D (49-44)	D (47-41)
MD	**2002**	**D**	**4D / 4R**	**6D / 2R**	**D (57-40)**	**D (55-45)**
MA	2002	D	10D	10D	D (60-33)	R (51-47)
MI	**2001**	**R**	**9D / 7R**	**9R / 6D**	**D (51-46)**	**R (62-38)**
MN	2002	Court-imposed	5D / 3R	4D / 4R	D (48-46)	I (37-34)
MS	2002	Court-imposed	3D / 2R	2D / 2R	R (58-41)	D (50-49)
MO	2001	Split	5R / 4D	5R / 4D	R (50-47)	D (49-48)
MT						
NE	2002	R	3R	3R	R (62-33)	R (54-46)
NV	2001	Split	1R / 1D	2R / 1D	R (50-46)	R (52-42)
NH	2002	R	2R	2R	R (48-47)	D (49-44)
NJ	2002	Commission	7D / 6R	7D / 6R	D (56-40)	D (56-42)
NM	2002	Court-imposed	2R / 1D	2R / 1D	D (48-48)	R (55-45)
NY	2002	Split	19D / 12R	19D / 10R	D (60-35)	R (54-33)
NC	**2001**	**D**	**7R / 5D**	**7R / 6D**	**R (56-43)**	**D (52-46)**
ND						
OH	**2002**	**R**	**11R / 8D**	**12R / 6D**	**R (50-46)**	**R (50-45)**
OK	2002	Court-imposed	5R / 1D	4R / 1D	R (60-38)	R (58-41)
OR	2001	Court-imposed	4D / 1R	4D / 1R	D (47-47)	D (64-30)
PA	**2002**	**R**	**11R / 10D**	**12R / 7D**	**D (51-46)**	**R (57-31)**
RI	2002	D	2D	2D	D (61-32)	R (51-42)
SC	2002	Court-imposed	4R / 2D	4R / 2D	R (57-41)	D (53-45)
SD						
TN	**2002**	**D**	**5R / 4D**	**5D / 4R**	**R (51-47)**	**R (69-29)**
TX	**2003**	**R**	**17D / 15R**	**21R / 11D**	**R (59-38)**	**R (58-40)**
UT	2001	R	2R / 1D	2R / 1D	R (67-26)	R (56-42)
VT						
VA	**2001**	**R**	**7R / 3D / 1I**	**8R / 3D**	**R (52-44)**	**R (56-43)**
WA	2002	Commission	6D / 3R	6D / 3R	D (50-45)	D (58-40)
WV	2001	D	2D / 1R	2D / 1R	R (52-46)	D (50-47)
WI	2002	Split	5D / 4R	4D / 4R	D (48-48)	R (60-39)
WY						

1. Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming elect their Representatives at-large and thus do not draw congressional districts.
2. The highlighted rows show States in which the most recent redistricting plan resulted in gains for the party in control of redistricting.
3. The data contained in this table appear in Michael Barone & Richard E. Cohen, *Almanac of American Politics 2004* (2003); Michael Barone & Richard E. Cohen, *Almanac of American Politics 2002* (2001); and Congressional Quarterly, *CQ's Politics in America 2002* (2001).

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In The
Supreme Court of the United States

EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

TRAVIS COUNTY, TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

GI FORUM OF TEXAS, *et al.*,

Appellants,

v.

RICK PERRY, Governor of Texas, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF OF *AMICUS CURIAE* RON WILSON IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Ron Wilson is an African-American Democrat who served the state of Texas for 27 years as a member of the Texas House of Representatives and, as is shown below, has a unique perspective on this appeal that may assist this Court. *See* Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1. In 1997, Mr. Wilson was named as one of the state's top ten legislators by Texas Monthly Magazine, which described him as a "revolutionary." *See* Paula Burka, Patricia Kilday Hart, John Spring, & Tania Krebs, *The Best & Worst Legislators 1997*, Texas Monthly Magazine, July 1997, at 96.

Representative Wilson owes no allegiance to Tom Delay. Rather, he has been an active, outspoken Democrat his entire life. Wilson was first introduced to state politics in 1973, while a student at the University of Texas in Austin, where he was an aid to African-American Democratic State Representative Mickey Leland of Houston, Texas. *See Texas House of Representatives District 131; Democrats; Ron Wilson*, The Houston Chronicle, March 1, 1998, at Voter's Guide, pg. 7; *see also* Ken Herman, *Wilson Pays A Price For Siding With GOP*, Austin American Statesman, March 11, 2004, at A1; *see also* Scott S. Greenberger, *Wilson Happy To Be Austin's Antagonist: Houston Legislator Derides Idea That Developer Is Behind His*

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[1] Pursuant to Rule 37.6 of this court, *amicus curiae* states that no party had any role in writing this brief and that no one other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties.

Bills, Austin American Statesman, March 14, 1999, at A1. Three years later, when he was only 23 years old, Wilson was elected to the Texas House of Representatives for the 131st District, in Houston, Texas. *See* Ken Herman, *Wilson Pays A Price For Siding With GOP*, Austin American Statesman, March 11, 2004, at A1. At the time he left his seat in the Texas House in 2004, Wilson ranked fifth in seniority among Texas' 150 House members. *See* Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1.

During Representative Wilson's long career in the Texas House, he served on[2] and chaired a variety of committees and was responsible for numerous pieces of significant legislation. In fact, Wilson chaired the following committees: Public School Finance Select Committee on Tax (2001-2003); Ways and Means (2001-2003); Licensing and Administrative Procedures (1991-2001); Liquor Regulations (1985-1991); Rules, Select (1989-1991); Health Services (1979-1981); Junior College Funding, Select (1977-1979). *See* Committee Information for Ron Wilson, Slip File for Texas Congressman Ron Wilson at the Texas Legislative Reference Library. In addition, Texas Speaker of the House, Tom Craddick, appointed Wilson to be in charge of the Texas House tax-writing panel. *See* William

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[2] Representative Wilson served on these committees and others: Judicial Affairs, Public School Finance, Election, Teacher Health Insurance, Energy Resources, Revenue and Public Education Funding, Pensions and Investments, State Affairs, Department of Human Resources Audits, Human Services, Public Health, Calendars, Texas Department of Mental Health and Mental Retardation. *See* Committee Information for Ron Wilson, Slip File for Texas Congressman Ron Wilson at the Texas Legislative Reference Library.

McKenzie, *New Alliances In House Turning Heads*, The Dallas Morning News, February 11, 2003 at 15A.

Through these key leadership positions, Wilson fought to enact legislation that advanced minority interests. *See* Ron Nissimov, *Ron Wilson: A Man of Contradictions, Controversy*, The Houston Chronicle, January 11, 2004. For example, Wilson advocated the creation of an independent, civilian review of the police force to end racial profiling. *See For Wilson: Democratic Incumbent In Texas House District 131*, The Houston Chronicle, January 31, 2002, at A24. To improve education for African-Americans and minorities, Wilson supported legislation to provide private school vouchers to low-income students from six of the state's largest urban districts. *See* Janet Elliott, *Wilson Proposes Voucher Program; Bill Aims To Help Poor Schoolkids*, The Houston Chronicle, December 18, 2002, at A41.[3] In an effort to cure the dramatic decrease in minority enrollment at public universities, Wilson supported House Bill 484, which allowed the top ten percent of graduates from state-supported universities to receive automatic admission to public university graduate or professional schools. *See Higher Education Agencies and Institutions Present 2004-2005 Budget Building Blocks to House Appropriations Subcommittee on Education*, http://www.ktcinet.com/aaup/Wanda/feb_28_2003.htm. Additionally, to protect minority business interests, Wilson supported legislation to open to the public the contents of the files related to businesses in the state's racial and gender contracting quota program. *See Texans Seek to End Use of Racial Quotas and*

[3] Nationally, school vouchers enjoy support by a considerable majority of African-Americans, especially low-income African-Americans. *See, e.g.*, Straight Talk on Vouchers, Washington Post, at A18, May 12, 2003.

Racial Preferences: Ward Connerly Lends His Support to Texas Battle, http://www.adversity.net/texas/initiative.htm (last visited on January 19, 2005).

Furthermore, Representative Wilson's experience includes the subject of this appeal – congressional redistricting. Wilson was one of the ten legislators chosen to be a member of the Texas House-Senate panel on redistricting. *See* John Moritz, *House-Senate Panel To Seek Compromise*, Fort Worth Star Telegram, September 26, 2003, at 6B. After reviewing the evidence presented to the Committee on the plan at issue, Wilson supported the Republican-drawn redistricting map because he believed that it provided the best opportunity to add an additional African-American Congressman from Texas. *See* John Moritz, *Legislator: Remap Targeted Frost*, Fort Worth Star Telegram, at 1B. This belief was founded on Wilson's experience. Wilson's long experience also leads him to believe that minorities' voting rights are better served by the creation of "safe" minority-majority districts, which ultimately send more Black and Hispanic representatives to Congress. Wilson believes this result is desirable, even if it costs incumbent white Democrats their seats, because he believes African-Americans initiate bills on minority issues far more often than white Democrats with black constituents. He also believes that holding actual seats gives blacks the power of the incumbency and other similar benefits. *See id.* According to Wilson, minority influence districts (an alternative to minority-majority districts) are nothing more than "begging and pleading, step-and-fetch-it districts" which do little, if anything, to really promote minority interests. *See id.* Although Wilson lost his legislative seat after supporting this

Plan,[4] he still believes his support of the plan was the right decision because an African-American ultimately unseated a Caucasian incumbent, in the Democratic primary for the redrawn 9th Congressional District, giving the district an African-American representative. *See* Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1.

Wilson's insight into the instant dispute is unique – not only is he one of the few Democrats who supported a Republican redistricting plan – he is also an experienced African-American legislator familiar with Texas' voting patterns and with the redistricting process who is licensed to practice law and to practice before this Court. According to the Republican Speaker of the Texas House, Tom Craddick, Wilson "probably knows more about redistricting than most of the people on the House floor." *See* Associated Press, *Maverick Democrat Part of GOP Team Negotiating Redistricting*, Tyler Morning Telegraph, September 29, 2003. Thus, former Congressman Wilson respectfully submits this *amicus curiae* brief for the Court's consideration.

SUMMARY OF THE ARGUMENT

This Court should affirm the decision of the court below because the Texas Legislature properly exercised its authority to re-draw the Texas Congressional District map. Texas'

[4] The Texas Democratic Party, angered by his support for the Republican-backed congressional map, successfully worked to remove Wilson from his seat. *See, e.g.*, Clay Robinson, *Wilson Resigns Seat With Five Months Left; House Democrat With A 27-year Run Was Defeated In March's Primary*, The Houston Chronicle, August 5, 2004, at B1.

choice, to draw "safe" minority-majority districts to ensure that minorities are fairly represented in Congress, met the requirements of the Voting Rights Act and the Constitution and this Court should not interfere in the inherently legislative task of redrawing Congressional maps.

ARGUMENT

I. This Court Should Affirm the Decision Below Which Found that Plan 1374C Did Not Violate Section 2 of the VRA.

Even if the Jackson Plaintiffs could meet the preconditions[5] necessary to bring a claim under Section 2 of the Voting Rights Act ("VRA"), this Court should still affirm the decision below because, in passing Congressional Redistricting Plan 1374C, the Texas Legislature properly exercised its prerogative to create additional minority-majority districts to increase minority Congressional seat opportunities in proportion to the percentage of minority members in the Texas population.[6] Thus, this Court should

[5] The test developed in *Thornburg v. Gingles*, 478 U.S. 30 (1986) requires a plaintiff to meet a three-pronged test, in order to state a claim under Section 2 of the Voting Rights Act: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a *majority* in a single-member district." 478 U.S. at 50 (emphasis added). "Second, the minority group must be able to show that it is politically cohesive." *Id.*, at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Id.*

[6] For example, Plan 1374C's three "safe" African-American districts comprise 9.4% (3/32) of the available districts which is comparable to the percentage of the black Texas voting-age population: 11.7%.

affirm the Texas Legislature's choice to create "safe" minority-majority districts, as opposed to coalition districts, to meet Section 2 of the VRA, in its redistricting map.

The Elections Clause[7] of the United States Constitution expressly delegates the power to create and modify Congressional districts to the state legislatures. U.S. CONST. art. I, § 4. As this Court held in *Ashcroft* (in a Section 5 context), the states are also given, as a part of this power, the flexibility to choose one theory of effective representation (a smaller number of safe minority-majority districts) over another (a greater number of influence or coalition districts). *Georgia v. Ashcroft*, 539 U.S. 461, 574, 123 S.Ct. 2498, 2511-12 (2003). This holding reflects the fact that a state must be allowed to select the form of representation that is most effective for that particular state, given its political realities, as long as the selection meets the requirements of the Equal Protection Clause and Section 2 of the Voting Rights Act. There was ample evidence below that Plan 1374C met those requirements and effectively implemented this Court's "one man, one vote" rule in Texas.

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[7] "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). This Court has long held that the power delegated to States includes the power to draw congressional districts. *See Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, § 4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). And, the Court has repeatedly held that, "the Constitution leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment."); *Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature.").

A. The fight for equal voting rights.

As a young man, *amicus curiae* was actively involved in the fight to end voting discrimination in Texas. *Amicus curiae* was elected to the state legislature in 1973 and served for 14 terms. Tr. 12/18/03 AM at 65:8.[8] During his political career, *amicus curiae* gained expertise in the areas of Texas' voting patterns and redistricting rules and participated in the effort to enforce voting rights. Tr. 12/18/03 AM t 65:9-11.

As the Court will recall, the American effort to enforce minority voting rights developed in three stages. First came the battle for the ballot box. *See, e.g.*, Alexandar Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (2000); Marchette Chute, *The First Liberty: A History of the Right to Vote in America*, 1619-1850 (1969); Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* (1960). Yet, even after gaining the right to vote and an initial increase in black voters during Reconstruction, the level of Southern black political participation dropped dramatically and remained low and stagnant until passage of the Voting Rights Act of 1965. Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 Calif.L.Rev. 1589, 1594 (2004).

The Act, which was designed to address the second stage of the battle to enforce the Fifteenth Amendment's guarantees, became one of the most successful pieces of civil-rights legislation in history. Hayden, *supra*, at 1595-96. Section 2 of the Act tracked the language of the Fifteenth Amendment to prohibit the use of voting qualifications or practices that

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[8] When citing the transcript of the trial below, *amicus* will use "Tr.," followed by the date, whether the evidence was heard in the morning or afternoon, and then the page: and line.

denied or abridged the right of any citizen to vote on account of race or color and contained several provisions that swept aside many of the facially race-neutral devices that had previously been used to keep minority voters from the polls. *Id.*

The Voting Rights Act's effects were immediately evident. In covered jurisdictions, the percentage of eligible blacks that were registered to vote rose from 29% to over 52%. *Id.* Over succeeding decades, the level of minority voter participation continued its upward climb, slowly reducing the gap between minority and white voter registration. *Id.* This success, though, was somewhat limited, because mere access to the polls still did not guarantee equal voting rights. *Id.*

As a result, the second stage of the battle was over the right to cast a quantitatively undiluted vote and was addressed in this Court's mal-apportionment cases of the 1960s. Grant M. Hayden, *Law and Democracy: A Symposium on the Law Governing Our Democratic Process: Refocusing on Race*, 73 Geo. Wash. L. Rev. 1254, 1261 (2005). Census data showed that, over time, there had been significant demographic shifts from rural areas to cities, largely driven by the migration of rural blacks to the cities and the immigration of Europeans to American cities. Hayden, *Resolving the Dilemma*, *supra*, at 1596-1602. As a result, the votes of people living in urban areas, who were disproportionately members of minority groups, were numerically diluted when compared to the votes of rural voters. *Id.* These urban voters had few options for dealing with the problem because state legislators were not inclined to redistrict themselves out of power. *Id.* at 1598. Then, in *Reynolds v. Sims*, this Court held that one's right to vote for state legislators was unconstitutionally impaired when "its weight is in

a substantial fashion diluted" as compared to voters in other parts of the state. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

The "one person, one vote" standard soon became the rule in redistricting decisions, meaning that rural-controlled state legislatures could no longer allow the disparities between districts to grow. Hayden, *supra*, at 1599. Quickly, the inequalities in district populations were eliminated from the political landscape. Minority voters now had both the right to cast ballots as well as the right to have their votes assigned the same weight as those of other voters. *Id.*

Even though African-Americans and members of other minority groups had made tremendous strides in securing the right to vote, there was still work left to be done because it remained possible for minority votes to be qualitatively diluted. Hayden, *supra*, at 1602. This situation resulted in the third stage in the voting rights battle (and the one implicated in this dispute). Even with access to the voting booth, minority voters could still find their rights compromised by more subtle discrimination techniques, such as racial gerrymandering, which qualitatively diluted minority voting strength. *Id.* Such techniques prevent minority voters from combining their votes with the votes of other members of the same minority group in ways that would allow the group to elect a representative of its choice. Voting rights advocates used Sections 2 and 5 of the Voting Rights Act to attack this type of vote dilution. *Id.* The creation of minority-majority districts[9] became a critical solution to qualitative vote dilution. *Id.*

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[9] Minority-majority districts are those districts in which the majority of the voters are from a racial minority. *Johnson v. DeGrandy*, 512 U.S. 997, 1023 (1994).

B. The creation of minority-majority districts is a critical remedy for qualitative vote dilution.

As has been shown above, Texas has the power to choose the method by which it complies with Section 2 of the Voting Rights Act to eliminate qualitative vote dilution. Texas' solution to Section 2 dilution concerns was the creation of minority-majority districts that gave minority groups a number of "safe" congressional seats roughly proportional to the percentage of its minority population. *Session v. Perry*, 298 F. Supp. 2d 480-81 (E.D. Tex. 2004).

Nationally, to end qualitative vote dilution, the Congressional Black Caucus also pushed for the creation of minority-majority districts in order to bolster its ranks. *See* Hayden, *Resolving the Dilemma*, *supra*, at 1602-03. Likewise, civil-rights lawyers and the press pressed state legislatures to create minority-majority districts. *See* Hayden, *Resolving the Dilemma*, *supra*, at 1603. The Department of Justice ("DOJ"), through its preclearance power, has long attempted to increase the number of minority-majority districts as a way to end qualitative vote dilution. *See Miller v. Johnson*, 515 U.S. 900, 909, 917-18, 921, 925-26 (1995); Hayden, *Resolving the Dilemma*, *supra*, at 1603. Similarly, Section 2 lawsuits (or the threat thereof) were also factors in increasing the creation of minority-majority districts. *See* Hayden, *Resolving the Dilemma*, *supra*, at 1603. Finally, under the test that this Court articulated in *Gingles*, 478 U.S. 30 (1986), the remedy for vote dilution was presumptively the creation of minority-majority districts because, given the ubiquity of racial bloc voting, the test essentially gave rise to a cause of action wherever there was a sufficiently large minority

population to constitute a majority in a redrawn, single-member district.[10] All of these factors combined to result in the creation of more minority-majority districts in the 1990s. *See* Hayden, *Resolving the Dilemma*, *supra*, at 1603.

Nationally, the creation of minority-majority districts had an immediate effect on the electoral success of minority candidates. Hayden, *Resolving the Dilemma*, *supra*, at 1604. The number of African-Americans in Congress increased by 13 in 1992, which was the largest, single-year increase, in absolute numbers, in U.S. history. *Id.*; Richard L. Engstron, *Voting Rights Districts: Debunking the Myths, Campaigns & Elections*, Apr. 1995, at 24. All 13 representatives came from new minority-majority districts and all of these districts elected black candidates in both the 1992 and 1994 congressional elections. *See* Hayden, *Resolving the Dilemma*, *supra*, at 1604. Overall, there was a 50% increase in the size of the Congressional Black Caucus and a 38% increase in the size of the Hispanic Caucus as a result of redistricting after the 1990 census. *Id.* Minority-majority districting was, therefore, an effective remedy to vote dilution from the vantage point of minority candidates. *Id.*

In addition to increased numbers of minority representatives, there are other benefits to the creation of minority-majority districts. For example, minority officeholders are more likely than their white, liberal counterparts to lead efforts to introduce initiatives to help

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[10] While the *Gingles* test was created in response to vote dilution within a multimember district, it soon was used to attack other single-member districting plans that did not, in the view of minority plaintiffs, afford them the ability to fully participate in the political system. Hayden, *Resolving the Dilemma*, *supra*, at 1604.

minority communities. *See* Hayden, *Resolving the Dilemma*, *supra*, at 1604-05. While white Democrats may vote "the right way" on matters of importance to their minority constituents, they are less likely to take the lead on these issues. *Id.* Minority-majority districts also serve as important minority "ports of entry" into pluralist politics. *Id.* Through the use of minority-majority districts, minority candidates also gain the benefits of incumbency and are thereby given the chance to earn reputations that might bring additional white crossover support to their campaigns. *Id.* Thus, the creation of minority-majority districts brings many benefits to both minorities and society at large, in addition to producing more minority officeholders.

C. Minority-majority districts are the best way to address qualitative vote dilution issues in Texas and the Texas Legislature's choice of this method must be respected.

The benefits of minority-majority districts described above are also evident in Texas. The creation of such districts in Texas, in Representative Wilson's judgment, is by far the best way for Texas to comply with Section 2 of the Voting Rights Act.

As the Court will recall, the Texas Plan (1374C) was a Republican-dominated map; nevertheless, *amicus curiae*, an African-American Democrat, voted for the Plan. Tr. 12/18/03 AM at 72:14-73:15. As the Court will recall, the Republicans had won control over both houses of the state legislature and all the high-level state-wide offices in 2002, so Democrats would not have a lead role in creating the redistricting plan. *Session*, 298 F. Supp. 2d at 458. *Amicus curiae* supported the Republican-sponsored plan in large part because it offered,

through District 9, an additional "safe" seat in Congress for an African-American Democrat from the Houston, Texas area[11] and offered African-Americans the best plan available, given the political situation. *See, e.g.*, Tr. 12/18/03 AM at 68:19-24; 73:13; 77:9-78:5; 82:12-16; 98:1-4.

In fact, because the African-American population of Houston would support it, *amicus curiae* had previously tried to secure an additional African-American congressional seat when his party controlled the Texas Legislature and the governor's mansion, but the Democrats would not draw one. *See, e.g.*, Tr. 12/18/03 AM at 89:11-15. Thus, the Republican Plan offered something for his community that *amicus curiae* had sought for some time.[12] Tr. 12/18/03 AM at 104:18-21.

Not only did Plan 1374C increase African-American representation in the United States Congress, it also created additional seats for other ethnic minorities. In fact, Plan 1374C was referred to by members of the Texas Legislature as an "8-3" plan. The "8" refers to the number of districts containing 50% or greater HVAP, without regard to performance of the districts. Of these 8 districts, CD 25 was a newly-created majority Hispanic district. The "3" refers to the 3 African-American districts in this plan,

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[11] As *amicus curiae* testified below, "the train was on the track," that the "majority rules" and that he wanted to try to "get some of my folks on the train." *See* Tr. 12/18/03 AM at 72:21-73:10.

[12] Representative Wilson's support for more African-American representation is not new. In fact, 20 years before this dispute arose, Representative Wilson introduced legislation that would have provided for an additional "safe" African-American seat, from the Harris County area, in the Texas Senate.

two of which have 40% or greater BVAP (CD 18 and CD 30), and the third district being a newly-created CD 9 with BVAP at 36.5%. Because of the lower citizenship rate of Hispanics in CD 18, 30 and 9, the effective percentages of African-American voters allow them to dominate the primaries in these three districts.

The plan proposed five open seats, three of which were minority-majority districts: CD 9, CD 25 and CD 29. This fact increased the likelihood that a candidate of the minority communities' choice would be elected from these districts.

Although politics predominated in the drawing of Plan 1374C, the legislature also had to remain conscious of how particular changes might affect compliance with the Voting Rights Act. For example, CD 23 was reconfigured to increase the Republican index in that district so that incumbent Henry Bonilla's chances of reelection were improved. In order to avoid potential retrogression under Section 5 of the Voting Rights Act, a new Democratic-majority Hispanic opportunity district (CD 25) was created. The creation of CD 25 in turn affected old districts 27, 28 and 15. Furthermore, CD 24, held by a white Democrat, Martin Frost, was dismantled and made into several Republican-leaning districts. In order to avoid potential retrogression, a new Democratic performing African-American opportunity district (CD 9) was created in Harris County. Tr. 12/18/03 AM at 67:11-24; 72:1-25; 81:14-25; 82:1-16.

While the creation of additional "safe" minority-majority districts in Plan 1347C did reduce African-American influence in other districts, *amicus curiae* felt that the Plan was, overall, advantageous to African-Americans. African-Americans did not comprise a majority

of the votes in the districts from which minority voters were taken to create the "safe" districts, and, even in "coalition" with other minority groups, blacks could not control the elections in those areas, given the polarity of the black/hispanic voting patterns in those districts. Tr. 12/18/03 AM at 118:4-11.

While the Jackson Plaintiffs characterize District 24 as a district that must be protected under the VRA, the evidence is to the contrary: it was really just a Democratic-controlled district, not an African-American district. *Session*, 298 F. Supp. 2d at 484.

The record showed that African-American voters constituted 21.4% of the voting-age population in District 24. *Id.* at 482. Hispanics made up 33.6% of the voting-age population and 23% of the citizen voting-age population, and Anglos were the largest ethnic group in the district, making up a plurality of the voting-age population and a majority of the citizen voting-age population. *See* J.S. App. at 51a.

The record also showed that no black candidate ever filed in a District 24 Democratic primary against Frost, so there was no measure of what the Anglo turnout would be in a Democratic primary if Frost were opposed by a black candidate. J.S. App., at 55a. The fact that African-Americans voted for Frost in the primaries (when they had no other choice), does not prove that they could elect their candidate of choice. *Session*, 298 F. Supp. 2d at 484.

The conclusion that District 24 was not a performing district for blacks is also supported by the testimony of Congresswoman Eddie Bernice Johnson, an African-American Democrat who holds a seat in a nearby largely African-American district. J.S. App., at 55a. Congresswoman

Johnson testified that District 24 "was drawn for an Anglo Democrat." *Id.* Minority voters were deliberately split in 1991, with Martin Frost as the architect of that redistricting plan, in order to elect Frost, a white Democrat to District 24:

> "Q. What type of problems was the Dallas African-American population encountering in terms of being able to create [District 30]?
>
> A. It was split up, of course, to elect white Democrats. . . .
>
> Q. . . . wanted just to ask whether it's your opinion that the Hispanic population is divided across Congressional District now in the current plan?
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> A. To – yes, to a certain degree.
>
> Q. And what would you say is the motivation for the division?
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> A. I'll have to answer that the same way I answered to my attorney. It's to accommodate others.
>
> Q. And, in particular, white Democrats?
>
> A. Martin Frost."

See Tr. 12/17/03 PM, at 154:18-155:1; Tr. 12/17/03 PM, at 165:17-25.

In his trial testimony, *amicus curiae* called districts like the former District 24, "step 'n fetch it" districts because the African-Americans in those districts had to beg and plead, with their "hat[s] in their hand[s]," to the white congressmen in those seats to try to secure support for issues of importance to African-Americans. *See, e.g.*, Tr.

12/18/03 AM at 86:16-87:25. Often, these pleas were ignored. Tr. 12/18/03 AM at 68:9-11; 86:1-5; 87:15-25. Further, districts drawn for white Democrats do not give African-Americans real access to politics and cannot confer the benefits of incumbency on minorities. Thus, *amicus curiae* believes that districts, like former District 24, that are designed to be occupied by a white Democrat, do not best represent the interests of African-Americans.

While this Court has recognized that, as with anything, neither the minority-majority district model nor the influence/coalition district model is without flaws, it has also recognized that the choice between these models is for the states to make. *Ashcroft*, 539 U.S. 461, 482; 123 S.Ct. at 2498, 2512. Texas made its choice: the addition of new "safe" minority-majority districts. This Court should refrain from stepping into this inherently legislative role.

CONCLUSION

For the foregoing reasons, *amicus curiae*, Ron Wilson, requests that the Court affirm the judgment of the Court below.

Respectfully submitted,

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